IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

OCT 21 1974
MICHAEL RODAK, JR., CLERK

* * *

NO. 74-456

* * *

JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, MARK WHITE, SECRETARY OF STATE OF THE STATE OF TEXAS, AND CAROL VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS

Appellants

v.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, AND CHARLES DRAKE, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Appellees

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

* * *

JURISDICTIONAL STATEMENT

* * *

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

ELIZABETH B. LEVATINO
Special Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711

October 1974

I.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINION BELOW 2

JURISDICTION 3

QUESTIONS PRESENTED 3

STATUTE INVOLVED 4

STATEMENT 4

THE QUESTIONS ARE SUBSTANTIAL 6

I. WHETHER OR NOT THE STATE, VESTED WITH THE RESPONSIBILITY OF REGULATING THE ELECTION PROCESS IN THE INTEREST OF THE GENERAL PUBLIC, HAD A LEGITIMATE AND SUBSTANTIAL INTEREST IN ADOPTING LEGISLATION PROVIDING FOR LIMITED DISCLOSURE IN THE ELECTION PROCESS 7

II. WHETHER OR NOT A TEXAS ELECTION CODE REQUIREMENT THAT IDENTIFICATION OF A COMMERCIAL PUBLISHER OR PRINTER OF POLITICAL CAMPAIGN MATERIAL BE PLACED ON SUCH MATERIAL IS A SUBSTANTIAL INFRINGEMENT OF ANY FIRST AMENDMENT RIGHT . . 10

III. WHETHER OR NOT A PENAL STATUTE IS VOID FOR VAGUENESS IF COMPLIANCE MAY BE ACCOMPLISHED THROUGH A NUMBER OF ACCEPTABLE AND GENERALLY UNDERSTOOD METHODS 17

CONCLUSION. 21
CERTIFICATE OF SERVICE. 22
EXHIBIT A 23

TABLE OF AUTHORITIES

CASES:

American Party of Texas v. White, 39 L.Ed.2d 744 (1974). 3,8
Bates v. Little Rock, 361 U.S. 516 (1960). . . 16
Branzburg v. Hayes, 408 U.S. 665 (1972) . . . 11
Bullock v. Carter, 405 U.S. 134 (1972) 8
Connally v. General Construction Co., 269 U.S. 385 (1925) 18
Cox v. New Hampshire, 312 U.S. 59 (1941). . 11
Lewis Publishing Co. v. Morgan, 229 U.S. 228 (1913). 11,16
Lovell v. City of Griffin, 303 U.S. 444 (1938). 12
Miami Herald Publishing Company v. Tornillo, 94 S.Ct. 2831 (1974) 15
NAACP v. Alabama, 357 U.S. 449 (1958) . . . 7,16
Nash v. United States, 229 U.S. 373 (1913) . . 18
Pittsburg Press Co. v. Pittsburg Comm. of Human Relations, 413 U.S. 376 (1974) . 15
Poulos v. New Hampshire, 345 U.S. 395 (1953) 11
Rosario v. Rockefeller, 410 U.S. 752 (1973) . 3,8
Roudebush v. Hartke, 405 U.S. 15 (1972) . . . 8
Talley v. California, 362 U.S. 60 (1960) 7,12,14,16
Thomas v. Collins, 323 U.S. 516 (1945). . . . 11
United States v. Cohen Grocery, Co., 255 U.S. 81 (1921). 18

U.S. v. Insco, 365 F. Supp. 308 (M.D. Fla., 1973) 7,14

U.S. v. Scott, 195 F. Supp. 440 (M.D. Dak. 1961) 7,10

U.S. v. Donald H. Segretti, ____ F. Supp. ____ (M.D. Fla. July 26, 1973). 7,10

U.S. v. Vuitch, 402 U.S. 62 (1971) 19

Vierick v. United States, 318 U.S. 236 (1943) 11

STATUTES:

Article 14.04(d), Texas Election Code 18

Article 14.10(b), Texas Election Code . . . passim

Article 8.02, Texas Penal Code 19

Article 8.03, Texas Penal Code 19

18 USC 612 14

28 USC Sec. 1253 3

28 USC Sec. 1343 3

28 USC Sec. 2101(b). 3

28 USC Sec. 2281 3

28 USC Sec. 2284 3

42 USC Sec. 1983 3

UNITED STATES CONSTITUTION

First Amendment. . . . . passim

Fourteenth Amendment . . . . . passim

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

* * *

NO. _____

* * *

JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, MARK WHITE, SECRETARY OF STATE OF THE STATE OF TEXAS, AND CAROL VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS

Appellants

v.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, AND CHARLES DRAKE, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Appellees

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

* * *

JURISDICTIONAL STATEMENT

* * *

This appeal is from the judgment of the United States District Court for the Southern District of Texas, entered on August 20, 1974, in an action challenging the constitutionality of a portion of Article 14.10(b) of the Texas Election Code

which provides that:

> "all printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person paying for the advertising."

The Court below held that the above quoted language was unconstitutional in that it places a substantial infringement on Appellee printers' and publishers' right to print political material anonymously in violation of the First Amendment Freedom of the Press provision. The court further held that this section violated Appellee printers' and publishers' right for associational privacy derived from the First Amendment guarantee of freedom of assembly. The court found no compelling state interest to justify the burden placed on Appellee printers' First Amendment right. Finally, the Court held that the statute was void for vagueness in that the words "person paying for the advertising" were so vague that men of common intelligence would differ as to its meaning and application.

Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW

The opinion and order of the Court below are not yet reported. They were issued on August 20, 1974. They are reproduced in the separately bound appendix. (Pages 1 to 61.)

JURISDICTION

This suit was brought under 42 USC Sec. 1983 and 28 USC Sec. 1343 to enjoin the enforcement of the State law alleged to violate the First and Fourteenth Amendments of the United States Constitution. Jurisdiction of the three judge district court was invoked under 28 USC Sec. 2281 and 2284. The judgement of the district court was entered on August 20, 1974, and notice of appeal was filed in that court on August 23, 1974.

Application for a stay pending appeal was filed in the court below on August 23, 1974 and denied by the lower court on September 23, 1974. Application for a stay pending appeal of the lower court's order was presented to Mr. Justice Powell and granted by the full court on October 11, 1974, Mr. Justice Douglas dissenting.[1]

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 USC Sec. 1253 and Sec. 2101 (b). Jurisdiction is supported by Rosario v. Rockefeller, 410 U.S. 752 (1973); American Party of Texas v. White, 39 L.Ed. 2d 744 (1974).

QUESTIONS PRESENTED

I. WHETHER OR NOT THE STATE, VESTED WITH THE RESPONSIBILITY OF REGULATING THE ELECTION PROCESS IN THE INTEREST OF THE GENERAL PUBLIC, HAD A LEGITIMATE AND SUBSTANTIAL INTEREST IN ADOPTING LEGISLATION

---

[1] See Appendix, page 69

PROVIDING FOR LIMITED DISCLOSURE IN THE ELECTION PROCESS.

II. WHETHER OR NOT A TEXAS ELECTION CODE REQUIREMENT THAT IDENTIFICATION OF A COMMERCIAL PUBLISHER OR PRINTER OF POLITICAL CAMPAIGN MATERIAL BE PLACED ON SUCH MATERIAL IS A SUBSTANTIAL INFRINGEMENT OF ANY FIRST AMENDMENT RIGHT.

III. WHETHER OR NOT A PENAL STATUTE IS VOID FOR VAGUENESS IF COMPLIANCE MAY BE ACCOMPLISHED THROUGH A NUMBER OF ACCEPTABLE AND GENERALLY UNDERSTOOD METHODS.

STATUTE INVOLVED

The statute involved is a part of Subsection B of Article 14.10, Texas Election Code, as amended in 1973. Article 14.10 is printed in its entirety in the Appendix to this statement with emphasis added to the portion of the statute in question.

STATEMENT

This litigation involves an attack on the constitutionality of a portion of the Texas Election Code relating to campaign reporting and disclosure. In fulfilling the responsibility for regulation of the election process, the states have long recognized that fair and open election campaigns are an integral part of that process. The federal government and at least 33 other states (Exhibit A) have enacted legislation reaching the campaign

portion of an election and containing substantially similar disclosure requirements as that at issue in the case at bar.

From 1967 to 1973, Texas law required that campaign advertising reflect the name and address of either the person paying for the advertising or the printer or publisher of the advertising. In 1973, as a result of prior experiences by the people and officers of the State in which unethical and illegal conduct in campaigns could not be effectively traced or prosecuted due to the law in existence at the time, the Texas Legislature enacted House Bill Four. This legislation was a comprehensive revision of the Texas election laws regarding the reporting and disclosure requirements for political campaigns. One of the provisions of that bill is at issue here. The prior disclosure required on printed campaign advertising was altered to require that such advertising contain the name and address of both the person paying for the material and the printer or publisher of such material.

When identification of both sources of printed campaign material was required, Plaintiffs, a trade association consisting of persons engaged in the printing industry, and three named individual printers, instituted this suit claiming that the new requirement violated their First Amendment rights of freedom of press and speech and freedom of association. The Plaintiffs additionally complained that the phrase "person paying for the advertising" was so vague that it was unconstitutionally broad on its face.

The majority of the Court below held that the printers and publishers were entitled to assert

personal First Amendment rights of freedom of speech and press from which the right to print political material anonymously derived, and that the statute in question substantially restricted that right. Additionally the Court found that the printers and publishers as individual persons have a right to associational privacy and Article 14.10 (b) infringes on that right by requiring the public revelation that a printer has been of some assistance to a candidate or a cause, regardless of the printer's desire to have this fact known. The Court held that the State could not show a compelling interest sufficient to justify what the Court saw as substantial infringement of these First Amendment rights. Finally, the Court held that the phrase "person paying for the advertising" was subject to so many interpretations that it was unconstitutionally vague on its face. The Court enjoined the State from enforcing that part of Article 14.10 (b) which required disclosure of the printer or publisher and person paying for the advertising on printed campaign material.

THE QUESTIONS ARE SUBSTANTIAL

The significance of the questions involved in this litigation extends far beyond a statute of the State of Texas. The extent to which or method by which a governmental unit may discharge its responsibility for insuring a fair, open and orderly election process is at issue. This is a question of moment not only as an abstract legal question, but in the collective mind of the public at this time in our history when the realities of the political election process have been shown to include unfair, offensive, and illegal conduct on the part of some. The public and their elected representatives want a reaffirmation of honesty and trust in government. With such a goal the State of Texas, the federal government and some 30 more states have enacted election requirements that include the disclosure of the identity of the persons responsible for printed campaign advertising material. That requirement has come under attack, in this case by members of the printing industry, as being repugnant to the First Amendment and the line of cases relating to a right to publish anonymously (Talley v. California, 362 U.S. 60 (1960)) and the right to associational privacy (NAACP v. Alabama, 357 U.S. 449 (1958)). The United States Supreme Court has not decided these issues in the context of a state regulation of the election process either as to the actual existence or extent of the First Amendment rights of the printers and publishers or the authors of campaign material or as legitimacy of the state interest in the election process expressed in this type of disclosure requirement. The federal district courts which have considered questions substantially identical to the one at bar have in three instances rejected the constitutional attack and upheld the statute. U.S. v. Scott, 195 F. Supp. 440 (M.D. Dak. 1961); U.S. v. Insco, 365 F. Supp. 308 (M.D. Fla., 1973); U.S. v. Donald H. Segretti, _____ F. Supp. _____ (M.D. Fla., July 26, 1973.) Only in the case at bar did the federal court hold the disclosure in question to be constitutionally impermissible. It is now incumbent on the Supreme Court to give the definitive direction needed by the courts and legislative bodies, through taking jurisdiction of this cause on the basis of the following issues.

I.

WHETHER OR NOT THE STATE, VESTED, WITH THE RESPONSIBILITY OF REGULATING THE ELEC-

TION PROCESS IN THE INTEREST OF THE GENERAL PUBLIC, HAD A LEGITIMATE AND SUBSTANTIAL INTEREST IN ADOPTING LEGISLATION PROVIDING FOR LIMITED DISCLOSURE IN THE ELECTION PROCESS.

The states of this Union are vested with the primary responsibility for regulation of the election processes within their boundaries for both state and federal congressional offices. The importance of this responsibility is underlined by the specific grant of authority contained in Article I, Section 4, of the United States Constitution. That the states have compelling interests in preserving the integrity and orderliness of the election process cannot be a matter of dispute. American Party of Texas v. White, supra; Rosario v. Rockefeller, supra; Bullock v. Carter, 405 U.S. 134 (1972). And this interest has its foundation in the right of all citizens, voters and candidates, to choose their governmental representatives in an orderly, fair, and democratic manner. Regulation of elections embraces not only the time and place of voting, but also such elements as notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting votes, and canvassing returns. Roudebush v. Hartke, 405 U.S. 15 (1972). The conduct of political election campaigns is an intergral part of the election process and one without doubt encompassed by the right and responsibility of state regulation. It is during the time of the campaign that the voter actually makes his choice. The ability to make an informed choice depends both on the dissemination of information regarding a candidate or measure,

and on some assurance that the information received is not the product of the kind of activity which is now generally known as "dirty tricks". Pursuant to this end, the State of Texas, the federal government and at least 30 other states have enacted legislation imposing requirements that the political advertising material used for an election reflect its source. Specifically, Texas requires the name and address of the printer or publisher and the person paying for the advertising to be disclosed. This, however, is only a part of the campaign reporting and disclosure laws which were substantially amended by the Texas Legislature in 1973. These amendments were the result of past experiences in the campaign and election processes which unfortunately too often included unethical, chaotic, and illegal conduct which under prior law neither the state nor its citizens could effectively trace, prosecute, or regulate. The provision in question serves a number of functions. Initially it acts as a strong deterrent to those who would engage in scurrilous or falsely attributed attacks. Secondly, by requiring the identification of the person paying for the advertising, any member of the public may better evaluate the content of the material and may actually trace its source--in the event a false name was given to the printer. (See the remainder of Article 14.10 (b)). This provision also allows a method of checking the reported campaign expenditures required by another portion of the act. Clearly, to merely prohibit false or falsely attributed campaign material is insufficient. The crux of the problem is to determine when such conduct occurs. This problem is especially acute during a campaign as the time for detecting and correcting the wrong is limited. The

disclosure of only the person paying for the advertising was also found to be insufficient in the State of Texas for the same reason.

Yet, printers and publishers and the court below found little if any state interest in the disclosure requirement at issue. Such a position is in opposition to other federal courts which have upheld similar statutes, U.S. v. Scott, supra; U.S. v. Insco, supra; U.S. v. Donald H. Segretti, supra. The interest which the court and plaintiffs below have in this area also comes as a revelation to the numerous other states and the federal government that apparently felt they had an interest compelling enough to enact similar requirements regarding campaign publication of campaign material.

Appellants believe that, on review by this Court, the valid and compelling state interest in utilizing this limited disclosure requirement to preserve the integrity of the election process will be upheld and the judgment of the court below reversed.

II.

WHETHER OR NOT A TEXAS ELECTION CODE REQUIREMENT THAT IDENTIFICATION OF A COMMERCIAL PUBLISHER OR PRINTER OF POLITICAL CAMPAIGN MATERIAL BE PLACED ON SUCH MATERIAL IS A SUBSTANTIAL INFRINGEMENT OF ANY FIRST AMENDMENT RIGHT.

The interest and necessity of a state in regulating the election process as reflected in statutory controls is of course subject to constitutional limitations. The Texas provision in issue is

attacked as unconstitutionally infringing on printers and publishers First Amendment rights of freedom of the press and freedom of association. Specifically printers and publishers claim constitutional protection to print and associate anonymously.

Initially, it must be noted that neither the Constitution nor the United States Supreme Court has granted an absolute right of anonymity to the press.

Given the natural limitations upon the human capacity and opportunity to speak and publish, the founding fathers and the Supreme Court share a rightful concern about legislative restrictions imposed on the press. The protection afforded the written or spoken word is designed to preserve a marketplace for the free exchange of ideas. But the scope and definition of this freedom has evolved from a balancing of the freedom and the circumstance, interest or regulation purported to restrict such freedom. Indeed certain disclosure requirements placed on the press or on those who seek to engage in various types of expression have been upheld by the United States Supreme Court. Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913); Cox v. New Hampshire, 312 U.S. 59 (1941); Poulos v. New Hampshire, 345 U.S. 395 (1953); Viereck v. United States, 318 U.S. 236 (1943); Branzburg v. Hayes, 408 U.S. 665 (1972). Anonymity of the press cannot be the protected right; rather if the nature of the disclosure requirement is such that it is unjustifiably oppressive to the exercise of a free press or free speech, the requirement will be struck down with the result of leaving the printer or speaker anonymous. Thomas v. Collins, 323

U.S. 516 (1945); Lovell v. City of Griffin, 303 U.S. 444 (1938); Talley v. California, supra.

In the case at bar, printers and publishers attempt to establish a right to print anonymously through Talley v. California, supra. Their reliance is misplaced. In Talley the Los Angeles ordinance required identification of the author of "any handbills, in any place under any circumstances." 362 U.S. 60, at 633. The breadth of the ordinance and its lack of relation to any ongoing governmental interest or responsibility led the court to hold this particular ordinance in violation of the First Amendment. The interests of anonymity under the First Amendment protection of speech were succinctly discussed by Mr. Justice Black at page 64:

"Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne

was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

"We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. Bates v. Little Rock, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480; National Assoc. for Advancement of Colored People v. Alabama, 357 U.S. 449, 462, 78 S.Ct. 1163, 2 L.Ed.2d 1488. The reason for those holdings

BEST COPY AVAILABLE

> was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it, like the Griffin, Georgia, ordinance, is void on its face."

However, the judgment of the court was not based on the fact that the ordinance restricted anonymity but that its breadth would result in times and circumstances when the disclosure requirement would deter "discussions of public matters of importance."

The challenged language of 14.10(b), however, applies only during very limited times (a campaign) and only to certain groups (those printing material for such campaigns). It clearly does not eliminate anonymous "discussions of public matters of importance" at all times or even during the time of an election campaign. The propriety of a similar statute (18 USC 612) as part of an election regulatory scheme was recognized by the court, in U.S. v. Insco, supra, at page 1312:

> "That statute is therefore limited in its coverage to requiring fairness in federal elections and does not preclude anonymous criticism of oppressive practices and laws as referred to by the majority in Talley;"

The case at bar more properly fits within the reasoning of the Insco case, rather than Talley in determining the extent of First Amendment protections. If the statute in question does infringe on

First Amendment rights of the printer and publisher, which the state contends it does not, that infringement balanced against the strong state interest in insuring fair and open elections is so insignificant that any balancing of interests must fall on the side of the state.

Significantly, the purposes articulated by Mr. Justice Black for questioning an absolute ban on anonymous printing are far from applicable in the case at bar. Appellee printers and publishers have no such lofty purpose for seeking anonymity. Rather, they seek only to profit in private. The "expression" required of the printers and publishers is no more than the expression of their name. This is not the type of speech envisioned by the First Amendment which is integral to the preservation of a marketplace for the free exchange of ideas. It is truly a perversion of the intent of the First Amendment to afford its protection to expression of this nature undertaken because of a purely commercial relationship. Indeed this type of expression does not even rise to the level of commercial speech held to be beyond the protection of the First Amendment. Pittsburg Press Company v. Pittsburg Comm. of Human Relations, 413 U.S. 376 (1974).

Nor does this statute infringe on the right of a printer or publisher by requiring him to print "that which reason tells him should not be published" as so recently discussed in Miami Herald Publishing Company v. Tornillo, 94 S.Ct. 2831 (1974). In that case the paper was required by Florida statute to print replies by candidates to editorials if such editorials were critical of the candidates. If the case stands for the proposition

that members of the press cannot be required by the state to print anything, regardless of the nature of the material printed, the court would have discussed or at least noted the long-standing case of Lewis Publishing Co. v. Morgan, supra, upholding the registration and publication provisions of the Post Office Appropriation Act of 1912. The absence of such a discussion affirms the contention that a requirement to print is evaluated in terms of the nature of the material to be printed and the First Amendment, not merely the fact that a requirement exists.

The asserted right of printers and publishers to associational anonymity suffers from the same defective premise. The constitutionally protected right is to freely associate for the purpose of advancing ideas and airing grievances. NAACP v. Alabama, supra; Bates v. Little Rock, 361 U.S. 516 (1960). However, the holding in both NAACP v. Alabama, supra, and Bates v. Little Rock, supra, was that in each instance the law in question imposing some burden on a First Amendment right was not shown to have a relevant or substantial correlation to the state interest sought to be furthered. As Mr. Justice Black stated in Talley, infra, "there are times and circumstances" where such disclosure cannot be required by the states. In the case at bar, sufficient, substantial, and compelling interests are shown by the State in the limited disclosure requirement of Article 14.10(b), Texas Election Code.

Finally, printers and publishers seek the right of associational anonymity not to allow those to engage in free association for advancing ideas and airing grievances; rather they seek the protection for a purely commercial enterprise.

In summary, the printers and publishers seek to stretch the First Amendment protection, established and preserved to guarantee the free expression of ideas, to guarantee the pursuit of a commercial relationship, in utter disregard of the right and interest of the public at large to be fully informed of the candidates and issues in an election campaign.

III.

WHETHER OR NOT A PENAL STATUTE IS VOID FOR VAGUENESS IF COMPLIANCE MAY BE ACCOMPLISHED THROUGH A NUMBER OF ACCEPTABLE AND GENERALLY UNDERSTOOD METHODS.

Article 14.10(b) is also penal in nature because it provides for a fine of $100 to $5,000 and imprisonment for one to five years or both for noncompliance with its terms. The printers and publishers alleged and the court below held that the phrase "person paying for the advertising" was so vague that the printers would not know precisely whose name is to be placed on the advertisement, and therefore the phrase was unconstitutionally void on its face.

Initially it should be pointed out that the printers and publishers apparently had no trouble determining who "the person paying for the advertising" was from 1967 to 1973, when the law required disclosure of either the printer or publisher or the person paying for the advertising. This is easily understood if one examines the remainder of that subsection. The "person paying for the ad-

vertising" must sign a copy of the matter to be published, and if an agent, indicate his principal. Obviously the printers and publishers have accepted and printed either the contractor or, if an agent, the principal without question and without suffering any penal sanctions.

Additionally, under the 1973 campaign reporting and disclosure laws, expenditure of campaign funds may be made only by the candidate, his campaign manager or assistant campaign manager, or the campaign manager of a political committee under Article 14.04 (d), Texas Election Code. (Certain exceptions are contained in paragraphs (a), (b), and (c) of Article 14.04, but are not applicable to the case at bar.)

The test for vagueness of a statute is whether a person of ordinary intelligence could determine from the statute that his conduct was prohibited; Connally v. General Construction Co., 269 U.S. 385 (1925); that a standard of guilt is contained in the statute capable of providing guidance for the courts; United States v. Cohen Grocery Co., 255 U.S. 81 (1921); and that the individual and the courts would consider the prohibited conduct in substantially the same say, Nash v. United States, 229 U.S. 373 (1913).

The past history of Article 14.10(b) enhanced by the recent amendments to the operation of Texas election laws, clearly show that the phrase in question is not and never has been void for vagueness.

Finally, the statute is not deficient because more than one individual may be considered by the printer or publisher to be eligible for designation as he who pays for the advertising. Compliance

with the statute is met if the name and address of one of the individuals reasonably related to the purchase of the advertising is printed. Under Article 14.10(b) this would be the person contracting for the advertising or his principal if he is an agent. Any claim that the phrase in question is unconstitutionally vague because compliance may be met through more than one means has been properly disposed of by this Court. U.S. v. Vuitch, 402 U.S. 62 (1971) held that where there are several ways of complying with a statute, compliance if any of the reasonable ways is sufficient and the statute is not unconstitutionally vague. The burden is on the state to prove that the name appearing in the printed advertising was in no reasonable or logical way the person paying for the advertising. Finally, under the Texas Penal Code Articles 8.02 and 8.03[2] provide a defense to prosecution for a

---

[2]Sec. 8.02. PENAL CODE. Mistake of Fact.

(a) It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense.

(b) Although an actor's mistake of fact may constitute a defense to the offense charged, he may nevertheless be convicted of any lesser included offense of which he would be guilty if the fact were as he believed.

Sec. 8.03 Mistake of Law.

(a) It is no defense to prosecution that the actor was ignorant of the provisions of any law after the law has taken effect.

mistake of fact and a mistake of law. Therefore, if a printer mistakenly thought the person whose name he printed was the individual paying for the advertising when in fact another person was paying for it, the printer could not be prosecuted. If the printer relied on any part of the statute, the written directives of the Secretary of State, or even by this brief submitted by the Attorney General in this cause as to who was legally to be considered the person paying for the advertising when he printed the disclosure, he would be immune from prosecution.

Ftn. 2 cont.

(b) It is an affirmative defense to prosecution that the actor reasonably believed the conduct charged did not constitute a crime and that he acted in reasonable reliance upon:

(1) an official statement of the law contained in a written order or grant of permission by an administrative agency charged by law with responsibility for interpreting the law in question; or

(2) a written interpretation of the law contained in an opinion of a court of record or made by a public official charged by law with responsibility for interpreting the law in question.

(c) Although an actor's mistake of law may constitute a defense to the offense charged, he may nevertheless be convicted of a lesser included offense of which he would be guilty if the law were as he believed.

In summary, the integrated scheme of the Texas Election Code, and the full provisions of Article 14.10(b) make a claim or finding that the phrase "person paying for the advertising" is unconstitutionally void for vagueness, facetious and erroneous.

CONCLUSION

For the foregoing reasons, it is requested that the Court note probable jurisdiction of this case and set it for argument and plenary consideration.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

ELIZABETH B. LEVATINO
Special Assistant Attorney General

ATTORNEYS FOR APPELLANTS

P. O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Elizabeth B. Levatino, Special Assistant Attorney General of Texas, as of counsel for Appellants herein, hereby certify that true and correct copies of the above foregoing Jurisdictional Statement and separately bound Appendix have been served upon opposing counsel by placing copies in the mail, prepaid, to Mr. Gerald M. Birnberg, Attorney at Law, 2020 Southwest Freeway, Suite 302, Houston, Texas 77006, Counsel for Plaintiffs-Respondents; Mr. David Crump, Attorney at Law, 2535 Shakespeare, #4, Houston, Texas 77025, Counsel for Common Cause Amicus Curiae; Mr. Joe S. Moss, Assistant District Attorney, 301 San Jacinto, Houston, Texas 77002, counsel for Defendant-Petitioner Carol S. Vance; and Mrs. Mary Joe Carroll, Attorney at Law, P. O. Box 1148, Austin, Texas 78767, Counsel for Amicus Curiae Texas Daily Newspapers Association and Texas Press. Association.

Witness my hand this _____ day of October, 1974.

_____

ELIZABETH B. LEVATINO

E X H I B I T A

SIMILAR STATUTES FROM OTHER JURISDICTIONS

18 USC Section 612

Ala. Code Tit. 17, Section 282 (1959).

Alaska Stat. Section 15.55.030 (1971), as amended, (Supp. 1973).

Ark. Stat. Ann. Section 3-1104(i) (Supp. 1971).

Cal. Ann. Elec. Code Section 12047 (West 1961), as amended (Supp. 1973). (Relates to any material designed to defeat a candidate.)

Cal. Ann. Elec. Code Section 12049 (West 1961). (Relates to any material designed to defeat a measure on the ballot.)

Colo. Rev. Stat. Section 49-23-31 (1963).

Ga. Code Ann. Section 34-1307.1 (1970).

Ill. Ann. Stat. ch. 46 Section 29-14 (Smith-Hurd 1965), as amended (Supp. 1973).

Iowa Code Ann. Section 738.22 (1950).

Kan. Stat. Ann. Section 25-1714 (1964).

Kent. Rev. Stat. Section 123.095 (1971).

La. Rev. Stat. Ann. Section 18:1531 (West 1969).

Me. Rev. Stat. Ann. tit. 21, ch. 39, Section 1575 (1964), as amended, (Supp. 1973).

Mass. Ann. Laws ch. 56 Section 39 (1971) as amended (1973).

Md. Ann. Code art. 33, 26-16 (a) (7) (1971), as amended, (Supp. 1973)

Mich. Stat. Ann. Section 168.914a (1967).

Minn. Stat. Ann. Section 211.0[illegible] (1962), as amended, (Supp. 1973).

Miss. Code Ann. Section 23-3-37 (1972). (Candidate must approve and subscribe to all literature.)

Mo. Ann. Stat. Section 129.300 (1966).

Mont. Rev. Codes Ann. Section 94-1452 (1969). (This was one of several sections renumbered by Section 29, Ch. 513, Laws of 1973. New Section no. is section 23-4752, but latest printing of text of stat. is still Section 94-1452.)

Neb. Rev. Stat. Section 32-1153 (Supp. 1973).

N.H. Rev. Stat. Ann. Section 70:14 (1970), as amended (Supp. 1973).

N.J. Stat. Ann. Section 19:34-38.1 (1964).

N.D. Cent. Code Ann. Section 16-20-17.1 (1971), as amended, (Supp. 1973).

Ohio Rev. Code Ann. Section 3599.09 (1971).

Okla. Stat. Ann. tit. 26, Section 491 (Supp. 1973).

Ore. Rev. Stat. Section 260.360 (1969), as amended Ore. Laws 1971, ch. 749, Section 52. (Name and address of publisher, but not author, must appear on the literature.)

Penn Stat. Ann. tit. 25, Section 3546 (1963).

R.I. Gen. Laws Section 17-23-2 (1969).

Tenn. Code Ann. Section 2-1920 (Supp. 1973).

Utah Code Ann.,Section 20-14-24 (1969).

Vt. Stat. Ann. tit 17, Section 2022 (1968).

Va. Code Ann. Section 24.1 - 259 (1973).

W. Va. Code Ann. Section 3-8-12(a) (1971).

Wis. Stat. Ann. Section 12.14 (1) (West 1967).

***Washington's statute (Wash Rev. Code Ann. Section 29.85.270 (1965) was repealed in 1972 after being put to a vote of the people. Repealed by 1972 2nd Extra Session, ch.98, Section 20(2).

Supreme Court, U. S.
FILED
OCT 21 1974
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

* * *

NO. 74-456

* * *

JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, MARK WHITE, SECRETARY OF STATE OF THE STATE OF TEXAS, AND CAROL VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS

Appellants

v.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, AND CHARLES DRAKE, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Appellees

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

* * *

APPENDIX TO THE JURISDICTIONAL STATEMENT

* * *

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

ELIZABETH B. LEVATINO
Special Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711

October 1974

INDEX TO APPENDIX

A. Opinion of the lower court . . . 1

Majority Opinion 1

Bue, District Judge, specially concurring 42

Order of the Court 60

B. Notice of Appeal to the United States Supreme Court 62

C. Article 14.10, Texas Election Code, Political Advertising . . 65

D. Order of Court Granting a Stay . . 69

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, and CHARLES DRAKE, individually, and on behalf of all persons similarly situated	CIVIL ACTION
V.	
HONORABLE JOHN HILL, Attorney General of the State of Texas, HONORABLE MARK WHITE, Secretary of State of Texas, and CAROL S. VANCE, District Attorney for Harris County, Texas	NO. 73-H-1261

BEFORE GEE, CIRCUIT JUDGE,
SINGLETON AND BUE, DISTRICT JUDGES.

BY JOHN V. SINGLETON

In 1973 the 63rd Legislature of the State of Texas amended Article 14.10(b) of the Texas Election Code to provide as follows: "Any printed or published political advertisitng shall also have printed on it the name and address of the printer or publisher and the person paying for the advertising." Sanctions for the violation of

the law are a fine of not less than $100 nor more than $5,000 or imprisonment of not less than one year nor more than five years or both fine and imprisonment.

Plaintiffs are a trade association consisting exclusively of persons engaged in the printing industry and three named individual printers. They have brought this suit pursuant to 42 U.S.C.A. § 1983, alleging that the quoted language is unconstitutional because it interferes with their right to political and associational privacy and anonymity and because it abridges the freedom of the press. Further, they allege that the statute is unconstitutionally vague and imprecise. The plaintiffs have alleged that they fear and have reason to fear intimidation, harrassment, and reprisals if they are required to associate openly and publicly with certain political candidates or positions as required by the statute; they fear that persons seeing plaintiffs'

names on political advertising will mistakenly believe that the plaintiffs endorse those candidates or positions whose printing they undertake, and in this way the statute has a chilling effect on the exercise of first amendment rights. Further, they allege that they were unable to determine the requirements of the statute in that the terms "person paying for the advertising" and "publisher" are not defined.

Jurisdiction is founded on 28 U.S.C.A. §§ 1331 and 1343, 2201 and 2202. The case is before this three-judge district court by virtue of 28 U.S.C.A. §§ 2281 and 2284.

STANDING

The defendants have questioned the standing of the plaintiffs to rely on the rights guaranteed by the first amendment. The argument is that because there is no standing to assert the rights of third parties except in very narrow circumstances,

the printers have no standing because the rights they seek to assert are those of third parties, the politicians and voters. The printers, it is said, are only "commercial conduits" who are injured, if at all, in the pocket book--their personal political speech and association rights remain untouched by the law. This court believes that the printers are personally injured by the law.

The first amendment rights to freedom of speech and press exist not only because the authors of the Bill of Rights wished to humor the eccentricities of the man on the soap box but because they wished to secure forever the means of making the United States a free market place of ideas. The human voice and the human pen are vital to this goal but no more vital than the physical printing press itself and the persons who operate it. All of these rights exist because of the same goal. Who can say that

in achieving the goal any one element is more inportant or that because one element has commercial aspects it lacks standing to protect itself. All of these rights are so closely bound together that the goal they were created to achieve will fail should any one be curtailed. To say that the right of the printer physically to print the written word can be distinguished from the right of the author to have his words printed because the printer has no interest in the ideas he prints (his interest being in receiving a fee for his printing) is to ignore not only the clear language of the first amendment but the scheme behind that amendment. Restrictions on the printer do impede the author, but the printer's rights are not derived from the author's rights. The printer's rights are related to those rights--both are derived from the same idea behind the first amendment. The idea behind the first amendment would be severely threatened were we to limit the assertion of first amendment

rights to the author-printer who both writes and prints his ideas. Protection of speech and authorship is firmly grounded on a national policy of protecting the rights of both the individual and the whole people. Printing and publication may not rest on as strong an individual support as speech and authorship, but because without question printing and publication advance the rights of the people to know and understand they are no less deserving of protection than speech and authorship. In this sense the rights of the printer and publisher are no more derivative than the rights of the speaker and author.[1]

---

[1]To this court a printer is a person, natural or corporate, who for free or for a fee places for dissemination on paper, wood, or stone ideas be it his or others. If this is a proper definition of a printer, certainly that person would be as entitled to the first amendment protection as any other person and could effectively raise the constitutional question and should be afforded the full protection of that great constitutional commandment.

During the 1930's the Supreme Court embarked upon a course which defined the first amendment guarantees and emphasized their importance. In all of the long line of cases there was one theme: "the belief of the framers of the constitution that exercise of the rights lies at the foundation of free government by free men." Schneider v. Irvington, 308 U.S. 147, 160 (1939). Never, in these cases, are the rights in terms of personal rights purely for the sake of individual freedom, rather the rights are defined in terms of personal right for the sake of "free government by free men." This theme was not meant to diminish the obviously strong belief in individual freedom but to emphasize that individual freedom in the first amendment free-speech area is not cherished purely for its own sake but is cherished for the sake of all the people. It was seen as absolutely essential to the democracy which

the founding fathers established. The language of these earlier cases makes quite clear that the Supreme Court which first articulated the first amendment protections we take for granted today never considered a "commercial conduit" argument. In Near v. Minnesota, 283 U.S. 695 (1930), the Court cut down a Minnesota state statute which provided that a person or corporation which "regularly or customarily" produced, published, circulated, had in possession, sold, or gave away a "malicious, scandalous and defamatory newspaper, magazine, or other periodical," could be found guilty of publishing, etc., a nuisance and have the nuisance enjoined. The court said:

> In attempted justification of the statute, it is said that it deals not with publication per se, but with the business of publishing defamation . . . . Characterizing the publication as a business, and the business as a nuisance, does not permit invasion of the constitutional immunity against restraint.

283 U.S. at 720. It is true that in Near the publication existed only to put forth ideas of one group so that the publisher's case can be distinguished from the case of the independent contractor which we have here, yet the Supreme Court recognized that the first amendment gives to the press something which makes it more than a mere business.

In Grosjean v. American Press Company, 297 U.S. 233 (1935) there was an attempt to impose a license tax of 2% of the gross receipts of advertising of newspapers having a circulation of 20,000 or more per week. This was an attempt at regulating only the commercial aspects of a newspaper's operations, yet the Court did not hesitate to strike it down. Historically, taxation of the circulation of newspapers was a tool of repression, not because it took money from the pockets of the publishers but because it was a method of limiting "the circulation of information which the public

is entitled in virtue of the constitutional guarantees." 297 U.S. at 250. There was never any question of the standing of the plaintiffs in Grosjean to bring the suit which so directly involved them and to assert the first amendment as their protection.

What is more important, the Court stated the purpose of the first amendment:

> The grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information . . . the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.

297 U.S. at 250. It is important to realize this when treating the instant case because in our zeal to secure individual first amendment rights it often becomes hard to see that the ideal of free men governed by free men is just as dependent upon the vehicle of free speech--a free press. Not just the

freedom to write one's own tract, print it in one's basement, and distribute it on the street corner is at stake but the freedom to go to a printer in the business of printing what comes over the counter, pay him, and have printed one's tract is at stake. The purpose of the first amendment was to protect the person who only operates the press as much as the author-printer, not so much because otherwise the commercial printer might lose money but because without the printer many an author could not disseminate his ideas. Unless the mere printer has a right which is greater than that of the ordinary businessman, not only his self-interest will be harmed but the purpose of the first amendment will be defeated. It is in the public interest to keep printers in business and to keep speakers and writers speaking and writing. That public interest has historically been assertable not only by the individual author

and speaker but by the printer and publisher as well.

Later cases bear out this analysis. Smith v. California, 361 U.S. 147 (1959), concerned a bookseller convicted of violating a Los Angeles city ordinance which made it illegal for any person to have in his possession an obscene or indecent book in any place where books were sold or kept for sale. The Court said:

> It requires no elaboration that the free publication and dissemination of books and other forms of the printed word furnish very familiar applications of these constitutionally protected freedoms [of speech and press]. It is of course no matter that the dissemination takes place under commercial auspices [cites omitted]. Certainly a retail book seller plays a most significant role in the process of distribution of books.

361 U.S. at 154.

In Bantam Books v. Sullivan, 372 U.S. 58 (1962), the standing question was dealt with in a footnote:

> Appellants' standing has not been nor could it be, successfully questioned. The appellants have in fact suffered a palpable injury as a result of the acts alleged to violate federal law, and at the same time their injury has been a legal injury [cites]. The finding that the Commission's notices impaired sales of the listed publications, which include two books published by appellants, establishes that appellants suffered injury. * * * [A]ppellants are not in the position of mere proxies arguing another's constitutional rights. The constitutional guarantee of freedom of the press embraces the circulation of books as well as their publication [cite to Lovell] . . . . The publisher has the greater economic stake, because suppression of a particular book prevents him from recouping his investment in publishing it. Unless he is permitted to sue, infringements of freedom of the press may too often go unremedied.

372 U.S. at 63, n. 6.

Plaintiff's standing in the Bantam Book case was more tenuous than in the present case. There the publisher challenged a Commission set up by the state of Rhode Island to advise state book distributors and sellers. There was never any question of the standing of the distributor to

challenge the Commission notices. The publisher's standing was easily found because "unless he is permitted to sue, infringements of the freedom of the press may too often go unremedied."

It is significant to this court that neither in Pittsburg Press v. Pittsburg Commission on Human Relations, ____ U.S. ____, 37 L.Ed.2d 669 (1973), nor in New York Times v. Sullivan, 376 U.S. 254 (1964), were the parties asserting the first amendment rights challenged on the basis of standing. Yet, in both cases it was not the editorial policy which was the subject of the suit but advertisements. True, the question in both became one of whether or not the advertisements might constitute unprotected "commercial speech," but this question was one on the merits, not one of justicibility.

To hold that the printers in this suit have no standing, it would be necessary to distinguish between the newspaper or book

and the political pamphlet. Yet, in 1937 the Court settled that question:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

Lovell v. Griffin, 303 U.S. 444, 452 (1937).

The Court reiterated this sentiment in Mills v. Alabama, 384 U.S. 214, 219 (1966):

> The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars [cite to Lovell] to play an important role in the discussion of public affairs.

TEST

Amicus Common Cause has questioned the test to be used in measuring whether or not a state election law is offensive to the first amendment. Common Cause suggests

that since Branzburg v. Hayes, 408 U.S. 665 (1973), the compelling state interest test is no longer viable. This is probably an incorrect reading of the Branzburg case. As Gerald Gunther pointed out in his "The Supreme Court, 1971 Term," 86 Harv. L. Rev. 1, 141 (1972):

> The Court stressed that the "investigation of crime by a grand jury implements a fundamental governmental role of securing the safety of the person and property of the citizen." This the Court found to be a "compelling" governmental interest to which the practice of calling reporters to testify bore a "substantial" relation.[25]

And then in footnote 25, Professor Gunther went on:

> The Court refused to indicate whether it considered the proper test to be whether the information sought bore a "reasonable" relation or a "substantial" relation to the government purpose. * * * But the Court proceeded to apply the latter test and held that the government had succeeded in satisfying it . . . .
>
> Certainly, in the area of state control of the election process, the Court has

been unwilling to point out that it is using the compelling state interest test, probably because the "administration of the electoral process is a matter that the Constitution largely entrusts to the states." Kusper v. Pontikes, ____ U.S. ____, 38 L.Ed.2d 260, 266 (1973).

In Rosario v. Rockefeller, ____ U.S. ____, 36 L.Ed.2d 1 (1972), the Court rejected a challenge to a state's law which required a voter to enroll in the party of his choice at least thirty days before the general election in November in order to vote in the next subsequent party primary. One of the bases on which the statute was challenged was the assertion that it violated the voter's freedom to associate with the political party of his choice. The Court felt that the statute did not do this in any significant way. The law did not, for example, "lock" the voters into an unwanted preexisting party affiliation from

one year to the next. Rather, it merely imposed "a time limitation on when the voters had to act in order to participate in their chosen party's next primary." States, it conceded, have an interest in setting time limits for an orderly election process.

Having rejected the argument that the requirement was more than a time limitation, the Court concluded by concerning itself with whether or not the time limit in and of itself could be said to be an onerous burden on freedom of association. Because the state had a reasonable justification for the statute, that is, to prevent "raiding" during primary elections, the statute was upheld. "The resulting time limitation in enrollment is thus tied to a particularized legitimate purpose, and is in no sense invidious or arbitrary." 36 L.Ed.2d at 10.

In Rosario, the Court examined the quantum of restriction on associational rights, determined that it was insignificant, characterized the complained-of

restriction, and then reexamined it in light of its relationship to the goal the state was seeking to accomplish.

The Court followed a similar procedure in Kusper v. Pontikes, supra, another challenge to a state's election laws. In examining the restrictions in Kusper, the Court found that it did have a substantial effect on associational freedoms. This finding seemed to change the subsequent analysis from the one in Rosario: "As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of legitimate state interest." 38 L.Ed.2d at 267. The Court goes on to distinguish the Kusper case from Rosario and to hold that Rosario itself indicates that the goals sought by Illinois in Kusper can be obtained by less drastic means. Although the Court has not articulated its standard in these election cases, by its reference to "past decisions," in Kusper it can be assumed

that the compelling state interest test is alive and well, if in a slightly altered form. It must also be emphasized that these voter cases are factually quite different from the pure free-speech case with which we are faced here.[2]

---

[2]In the recent case Procunier v. Martinez, ___ U.S. ___, 40 L.Ed.2d 224 (1974), the Supreme Court addressed the problem of censorship of the mail to and from prisoners and the incidental burden on first amendment rights caused thereby. The Court said:

> Applying the teachings of our prior decisions to the instant context, we hold that censorship of prisoner mail is justified if the following criteria are met. First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression . . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. 40 L.Ed.2d at 240.

To this court, the Procunier case demonstrates that the compelling state-interest is still operative.

Clearly, if the burden on first amendment freedoms is more than incidental, the Court will not employ a "rational" state interest or "particularized legitimate purpose standard," as it did in Rosario, but will return to a standard which is similar, if not identical, to the compelling state-interest test.

What is known as the compelling state-interest test is set forth in this language in Schneider v. Irvington, supra, at 161:

> In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the free enjoyment of the rights.

With this test in mind, the merits of the case will be considered.

MERITS--FIRST AMENDMENT QUESTION

The plaintiffs assert two interrelated rights: (1) the freedom to print political material anonymously, derived from the first amendment's guarantee of freedom of the press, and (2) the printers' personal rights to associational privacy, derived from the first amendment's guarantee of the right to freely assemble for the redress of grievances.

Historically, anonymous publications have been considered basic implements of the expression of unpopular ideas or political beliefs. In Talley v. California, 362 U.S. 60 (1960), the Supreme Court judicially recognized the existence of a right to publish anonymously. Talley teaches:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously

> or not at all. The obnoxious press licensing law of England which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers.

362 U.S. at 64-65.

The Court expressly declined to pass on the validity of an ordinance or law limited in its purpose to the identification of those responsible for fraud, false advertising or libel, and decided the case on overbreadth. The purpose of the Texas election law is limited in purpose and cannot be said to be overbroad precisely in the Talley sense. But by placing a major part of the burden of identification on the printer, the legislature has failed to rid the statute of all that the Court found obnoxious in the Talley ordinance.

The Court said in Talley: "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." 362 U.S. at 64. The instant law restricts freedom to print, thereby freedom of expression. If he must place his name on the advertisement, the printer may decline to print matter submitted to him by dissident or unpopular groups for fear of official or unofficial reprisals which may be thrust upon him. This is a substantial infringement.

Furthermore, the printer, being the man in the middle, is hardly one upon whom to place the burden of policing the Texas Election Code. Precise regulation in the first amendment area would seem to dictate that, as Talley suggests, the legislature should seek directly to denounce and punish the campaign tacticians who may utilize the printing press for fraudulent purposes. By drawing the printers into the net the state

seeks to utilize them to make the job of investigation simpler, but at the same time it destroys the constitutional guarantee of anonymity. The printers must be left to enjoy anonymity unless there is some overriding governmental interest. Simplicity of investigation does not constitute this overriding interest.

Closely connected with the printers' rights as printers to print anonymously are the printers' rights as persons to associational privacy. Case law has established that forced disclosure of membership in a particular group may well violate the first amendment's guarantee of the free assembly. The Court has expressed the idea in this way:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional

> rights there involved [taxes on newspapers; regulations of labor unions; investigating lobbying]. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations . . . . Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order.

NAACP v. Alabama, 357 U.S. 449, 2 L.Ed.2d 1488 (1958). Logically, if it burdens one to be compelled to disclose associations, it must also burden one to be forced to associate oneself with an organization with which one is not in political or philosophical sympathy. "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom [to associate with others for the common advancement of political beliefs and ideas]." Kusper v. Pontikes, supra at 266. It could be said that the kind of associational disclosure contemplated by amended art. 14.10(b) is even more of a burden upon the person's first amendment rights.

Article 14.10(b) infringes on the right of associational privacy by creating a great probability that persons seeing the printers' names on political advertisements will mistakenly consider the name an endorsement of the candidate. Whether the printer desires the fact publicly known or not, the statute requires the printer to reveal that he has been of some assistance to the candidate. Indeed, the one who reads the publication may be unaware of the law which requires the printer to disclose his identity and may assume he did so voluntarily.

The State has countered with the argument that both these burdens can be avoided by the printing of a disclaimer, but disclaimers are not a solution for two reasons. In the first place, the statute refers to all political advertisements. There might well be room for a disclaimer on some advertisements but bumper stickers, for

example, leave little room for such. Neither does a small pamphlet have much room to contain the political message, the required disclosure, and an accompanying disclaimer. In the second place, disclaimers may well be ineffective. The fact that one disavowed in a disclaimer the ideas and ideals of the Communist Party, for example, would not put to rest the notion in the minds of many persons that the printer had nevertheless assisted the Communist Party in making its presses available to the party.

The State conceded that art. 14.10(b) does place a burden on these first amendment rights of plaintiffs but asserts that this does not automatically invalidate the law. The question to be decided at this juncture is whether or not a substantial burden is placed upon the first amendment rights of the plaintiffs. Article 14.10(b) demands that they abandon their right to print anonymously and their right of associational

privacy if they chose to print political advertising and avoid criminal prosecution. They have demonstrated under oath a legitimate, bona fide fear of intimidation, harassment, and reprisal, both economic and physical, if they are required to print their names on all political advertising. Their choice is very likely to be one for associational privacy and anonymity. If this happens, not only will they lose the business of printing political advertising but those unpopular political parties who wish to have their materials printed will be left without the services of the printing press. Most important of all, the underlying policy behind the first amendment is defeated.[3]

---

[3] Not only direct but indirect adbridgment is forbidden. Taxing (Grosjean) and licensing (Lovell) have been held restraints. So has the requirement that to receive a certain form of mail one must request it be delivered. Lamont v. Postmaster General, 381 U.S. 301, 14 L.Ed.2d 398 (1965). Nor must the

It is also important to remember that the rights of the first amendment will be curtailed at a time when they are most vital--during an election campaign. Surely, if the first amendment was designed to assure a free government by free men, then the political discussions of an election year are the most important of all. Yet, the State would curtail these discussions precisely at that time. That this state of affairs places a substantial burden upon the first amendment is clear to this court and needs no further elaboration.

It is equally as clar that the justification offered by the State of Texas is

Ftn 3, cont'd

statute, to be declared unlawful, have behind it the purpose to restrict the publication or dissemination of ideas. The fact that a statute may have a salutory purpose has no bearing on whether or not it should be held unconstitutional. Cf. Mills v. Alabama, 384 U.S. 415, 219-220, 16 L.Ed.2d 484, 488-89.

not substantial, paramount, or compelling enough to justify this burden upon the first amendment, in light of the distinct possibility that the State can fashion alternative means for discovering the identity of those who abuse the election process.

> [A]dministration of the electoral process is a matter that the Constitution largely entrusts to the States. But in exercising their powers of supervision over elections . . . the States may not infringe upon basic constitutional protections.

Kusper v. Portikes, supra, at 266. Cf. Mills v. Alabama, supra. The State has alleged that the statute in question is necessary in several ways to the orderly election process. Amicus Common Cause alleged many more. Essentially, the argument is that by requiring the printer to put his name on the political advertisement and requiring him to keep a record of the name and address of the person who paid for the advertisement, the State and the public have an easy way

of identifying persons responsible for the advertisements. There are basically four reasons why the identification of persons responsible for advertisements is deemed desirable:

1. Responsibility for fraudulent, deceitful, libelous, or falsely attributed statements in political advertisements can be ascertained.

2. The informed voter is entitled to know who is supporting particular candidates or positions and what "media companies" are molding the image of the candidate.

3. The opposing candidates are in a better position to reply to campaign accusations.

4. The actual advertsing expenditures of candidates are more easily determined by both the State and the public.

In essence, the State seeks to go through the printer to obtain information about questionable or illegal activities,

or to give the public and the opposing candidates information about the persons responsible for the candidacy or image of any particular candidate.

As laudable as these goals may be, the method is rife with fatal flaws. The State would have this court believe that these few lines of the Election Code constitute the linchpin of the scheme of the Code; yet, for the most part, the printers are nothing more than middlemen.

Initially, it must be remembered that there is no affirmative penal sanction in Texas for campaign "dirty tricks." So long as the printer prints some identity for the trickster and his own identity, presumably he is free from any sanction. Even if there were affirmative penal sanctions, since there is no requirement that the printer research the identity of the person who submits the advertisement for printing, there is no assurance that the campaign trickster's identity will be his true identity. The goal of

prevention of campaign "dirty tricks" is not likely to be achieved by art. 14.10(b).

Secondly, the informed voter-candidate policy, laudable as it is, is not sufficient to justify substantial infringement on first amendment freedoms. Cf. Thomas v. Collins, 323 U.S. 538, 89 L.Ed. 445 (1944) and Lewis v. Baxley, ____ F.Supp. ____, 42 L.W. 2347 (three-judge ct. M.D. Ala. Dec. 21, 1973). The statute also provides that the identity of the person paying for the advertisement be disclosed, with a veiw to enabling the voter to vote more effectively. The identity of the printer coupled with his list of advertisers is supposed to provide the opportunity of a double check on who the advertisers are; yet, how meaningful that opportunity is, in light of the possibility that dishonest tricksters will not truly identify themselves, remains a question.

The argument that the amount of campaign expenditures can be better ascertained does seem the most plausible use for the

statute, but it also sweeps too broadly. For example, the printers could be required to keep records of the expenditures of candidates and report them to the state authorities, without printing their identity on the very advertisements. True, a candidate or a member of the general public who wishes to find out how much the candidate spends on a particular item of advertising may have an easier time of it if he can call the printer directly, but a call to Austin, where such records might be kept, is not such an impossibility that it justifies the burden on the printers' first amendment rights.

The plaintiffs in this case are not asserting an absolute privilege of associational privacy and anonymity. They fear the consequences of a disclosure statute which requires them to publish in close proximity to the political sentiments advertised their names and addresses. This

court believes that the requirement places a substantial burden upon the printers personally and upon the first amendment itself. The defendants have suggested that the only burden upon the plaintiffs is economic and, therefore, unprotectable. To reach such a conclusion we would have to discard the language of a long line of Supreme Court cases which deal with the first amendment rights of newspapers and booksellers. Cf. Near v. Minnesota, supra; Bantam Books v. Sullivan, supra; Grosjean v. American Press Co., supra; Smith v. California, supra; Pittsburgh Press v. Pittsburgh Commission on Human Relations, supra.

The statute here, which has the distinct possibility of curtailing the printing activities of some or all of these printers, is no less restrictive than the statute struck down almost forty years ago in Grosjean. This statute, too, affected the pocket book of the newspaper publisher;

yet, the effect on the pocket book was quite logically seen to have a much more drastic effect on the future of publishing and the information to be received by the public. It was not the editorial content published by the newspaper which the court concerned itself with.

The fact that a reprisal may take an economic form does not cushion the reprisal or render the burden on the first amendment any less significant. In Pittsburgh Press, supra, the Court expressly limits itself to a situation in which financial ruin is not in question:

> Nor does Pittsburgh Press argue that the ordinance threatens its financial viability or impairs in any significant way its ability to publish and distribute its newspaper.

37 L.Ed.2d at 675-676. And, in NAACP v. Alabama, supra, the Court said:

> Revelation of the identity of its rank and file members has exposed those members to economic reprisals, loss of employment, threat of physical

> coercion, and other manifestations of public hostility.

357 U.S. at 462.

This court believes that the plaintiffs have demonstrated a probability of reprisals sufficient to engender in them a fear which significantly burdens their first amendment rights. The State's policy arguments are insufficient to overcome the substantial burden, especially since the statute, without the offensive clause, would operate in much the same way as it would operate with the clause. More importantly, it could be more narrowly drawn to achieve the State's desired goal.

MERITS--VOID FOR VAGUENESS

Our decision that the statute quoted is overbroad has mooted the question of whether or not the undefined word "publisher" gives fair notice to printers. There remains, however, the question of whether or not the words "person paying for the

advertising" is sufficient to apprise the printer of precisely whose name he is to place on the advertisement. Plaintiffs submit that the phrase could refer to a number of individuals, for example, the advertising agency paying the bills of the candidate, the campaign organization which is represented by the advertising agency, the person who donates the money earmarked for the advertisement, or the candidate himself, among others.

The plaintiffs point out further that the various interests which the election law seeks to advance would suggest a disclosure of the identity of a different person among the several choices available.

Article 14.10(b) which caries with it criminal penalties must be more explicit to stand. The printers must not be left to a guessing game.

The definition of "persons paying for the advertising" should be left to the

legislature for definition, but as the statute now stands complying with it is almost impossible because it is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . . " Connally v. General Construction Co., 269 U.S. 385, 391, 70 L.Ed. 322 (1926). For that reason, the phrase "person paying for the advertising" is unconstitutionally void on its face.

We conclude, therefore, that that portion of art. 14.10(b) of the Texas Election Code which reads: "Any printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person paying for the advertising," is unconstitutional and enjoin the State from its enforcement.

DONE at Houston, Texas, on this the 20th day of August, 1974.

Thomas Gibbs Gee
Circuit Judge

John V. Singleton
United States District Judge

Carl O. Bue, Jr.
United States District Judge

(Specially concurring)

JUDGE BUE (specially concurring)

I concur in the result reached by the majority, even though I cannot join in the rationale employed in portions of the opinion. My decision regarding the constitutionality of aritcle 14.10(b) is not based upon the denial of the First Amendment rights of the printers, since I do not believe they possess any, but rather upon the denial of the rights of persons who hire their services.

It is evident that the First Amendment protects not the written or spoken word itself, but the expression of ideas concerning social policy, political views, religious beliefs, etc. See, e.g., Pittsburgh Press Co. v. Pittsburgh Comm. of Human Relations, 413 U.S. 376, 385 (1973); New York Times Co. v. Sullivan, 376 U.S. 254, 265-66 (1964); Roth v. United States, 354 U.S. 476, 484 (1957). Accordingly,

the protection of the First Amendment is not limited to authors or speakers, but extends as well to those who distribute the written word, Bantam Books v. Sullivan, 372 U.S. 58 (1963); Smith v. California, 361 U.S. 147 (1959); Marsh v. Alabama, 326 U.S. 501 (1946); Lovell v. Griffin, 303 U.S. 444 (1938), or who express ideas through other types of conduct. See, e.g., Tinker v. Des Moines School District, 393 U.S. 503 (1969); Brown v. Louisiana, 383 U.S. 131 (1966). However, speech or conduct that expresses nothing of political or social importance is not subject to First Amendment protection. See, e.g., Roth v. United States, supra at 485; Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Karr v. Schmidt, 460 F.2d 609 (5th Cir. 1972). Thus, it is implicit in any consideration of First Amendment rights that a court determine what the speaker or actor is expressing and if this expression is worthy of First Amendment protection.

In the instant case, the printers, by their actions, express nothing. They do not argue that they are denied the right to print anonymously their own views in support of or in opposition to a candidate. To the contrary, they seek the right to print anonymously that for which they have no feeling one way or the other. Indeed, they seek anonymity to avoid expressing any type of conviction. Nor do the printers seek to distribute ideas. They merely receive orders from their clientele and return the finished product to the person hiring their services.

In this regard, a printer is to be distinguished from the publisher of a newspaper. Both are similar in that they require the services of a printing press. However, there the similarity ends. It is inherent in every newspaper that editorial judgment is involved, not only in the expression of viewpoint contained on the editorial page,

but also in the selection, rejection and placement of news items contained within its pages. See Pittsburgh Press Co. v. Pittsburgh Comm. of Human Relations, supra at 386. Furthermore, a newspaper publisher is actively involved in the distribution of that which he prints. Contrary to the printer, he is not just a mechanical means of reproduction of the printed word.

Furthermore, I do not find, for much the same reasons as expressed above, that the printers' First Amendment right of association is violated by article 14.10(b). The right of association, like the right of free speech, is protected in order to promote the expression of ideas.

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech . . . . Of course, it is immaterial whether the beliefs sought to be advanced by the association pertain to political, economic, religious or cultural matters . . . ."

N.A.A.C.P. v. Alabama, 357 U.S. 449, 460 (1958).

> The right of 'association,' . . . is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion . . . .

Griswold v. Connecticut, 381 U.S. 479, 483 (1965). In the instant case, however, the association of the printers and those who hire their services is not for the purpose of expressing any thoughts held by the printers; rather, it is purely a commercial relationship. Indeed, the printers seek anonymity because they do not necessarily hold the views of their customers. Purely commercial speech is not entitled to the protection of the First Amendment. E.g., Valentine v. Chrestensen, 316 U.S. 52 (1942). I do not believe that commercial association should be accorded any more sacred a position.

However, in holding that the printers have no First Amendment rights of their own in this situation, the importance of the printing press and the man who operates it is not to be underplayed. It cannot be questioned that his role in providing a means for expression is indispensable. But his importance as a means for the exercise of First Amendment rights for those hiring his service does not give him First Amendment rights beyond his own right of self-expression. Accordingly, a printer who merely performs a mechanical function is not exercising his First Amendment rights. In summary, the printers seek to print anonymously when they themselves are saying nothing and supporting nothing. Their actions cannot constitute "speech" as protected by the First Amendment.

Even though the action of the printers is not accorded the protection of the First Amendment, this does not preclude consideration of their challenge to the constitutionality

of article 14.10(b). Although the statute in question may be constitutional as applied to the printers since they have no First Amendment rights, these same printers may still challenge the statute as facially unconstitutional. This is so because the bar to standing to assert such a challenge is traditionally disregarded when a statute dealing with First Amendment rights is attacked as facially unconstitutional for overbreadth. See Broadrick v. Oklahoma, 413 U.S. 601, 610-613 (1973); United States v. Raines, 362 U.S. 17, 22 (1960). In cases falling within this narrow ambit, the Supreme Court has held that it will bypass its usual practice of considering first if the constitutional rights of the individual challenger have been violated and will consider the statute as a whole, regardless of whether its application to the challenger can be viewed as unconstitutional. See Sedler, Standing to Assert Constitutional Jus Tertii in the

Supreme Court, 71 Yale L.J. 599, 612-26 (1962). "Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the Court to refrain from constitutionally protected speech or expression," Broadrick v. Oklahoma, supra at 612. Accord Gooding v. Wilson, 405 U.S. 518 (1972); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); N.A.A.C.P. v. Button, 371 U.S. 415, 432-33 (1963); Thornhill v. Alabama, 310 U.S. 88, 97 (1939); Mancuso v. Taft, 476 F.2d 187, 190 (1st Cir. 1973); LeFlore v. Robinson, 434 F.2d 933, 936 (5th Cir. 1970), vacated on other grounds, 446 F.2d 715 (1971).

Of course, the law's special treatment of the issue of standing in the First Amendment area does not mean that any person may challenge a statute concerning free speech.

It is necessary that other relevant aspects of a "justiciable controversy" be present. See Flast v. Cohen, 392 U.S. 83, 95 (1968). In any action involving a declaratory judgment as to the constitutionality of a state law, there must be sufficient adversity to warrant federal adjudication. See Golden v. Zwickler, 394 U.S. 103, 108 (1969); Poe v. Ullman, 367 U.S. 497 (1961); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. R. 844, 863-64 (1970). Furthermore, although it is not necessary that the party challenging the statute be the subject of a criminal prosecution, see Doe v. Bolton, 410 U.S. 179, 188-89 (1973), it is necessary that the plaintiff be subject to "a real threat of enforcement". Poe v. Ullman, supra at 507.

In the case presently under consideration, it is readily apparent that we are concerned with a statute affecting, on its face, First Amendment rights of speech and

press. Plaintiffs have challenged the statute because of vagueness and facial unconstitutionality. Unlike the challenged statute in Broadrick, article 14.10(b) is not concerned with the regulation of conduct, but with the regulation of speech itself in the form of printed material. Further, the threat of enforcement of the challenged statute is sufficiently real to deter the printing of anonymous literature and to support the printers' right to bring this action. Article 14.10(b) provides fines and imprisonment for non-compliance with its terms. The statute operates directly upon the plaintiffs in this action. Although the Court has been presented with no evidence of enforcement of the article's penal provisions, there is no indication that state officials intend to disregard the law. Accordingly, the plaintiffs have alleged a justiciable controversy, and it is necessary to consider the merits of

their claims that article 14.10(b) is facially unconstitutional and void for vagueness.

While First Amendment rights are accorded a "preferred position" among Constitutional rights, Saia v. New York, 334 U.S. 558, 561 (1948), the right for free speech is not absolute. See, e.g., Adderly v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 536 (1965); Schenck v. United States, 249 U.S. 47 (1919). Thus, any consideration of the constitutionality of a statute allegedly infringing First Amendment rights first must involve a balancing test to determine if the interests of the state in regulating expression substantially outweigh those of the individual. To prevail, the state's interest, it appears, must be compelling. See, e.g., American Party of Texas v. White, 39 L.Ed.2d 744, 760 (1974); N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963). Once the state is found

to have the requisite interest in regulation, a court must consider if this interest burdens unnecessarily other protected activities. See, e.g., Grayned v. Rockford, 408 U.S. 104, 116-17 (1972). "Free expression 'must not, in the guise of regulation, be abridged or denied.'" Id. at 117, citing Hague v. CIO, 307 U.S. 496, 516 (1939).

In the instant case, we are faced with the task of balancing the interest of the state in preventing election fraud with that of the individual in publishing campaign literature anonymously. It is beyond question that the state has a compelling interest in preserving the integrity and orderliness of elections. See, e.g., Storer v. Brown, 39 L.Ed.2d 714, 725-26 (1974); Rosario v. Rockefeller, 410 U.S. 752, 761 (1973); American Party of Texas v. White, supra at 761 n. 14; Jenness v. Fortson, 403 U.S. 431, 442 (1971); Bullock v. Carter, 405 U.S. 134, 145 (1972). At the same time, it

is well recognized that the individual has a right to exercise his First Amendment rights anonymously. See Talley v. California, 362 U.S. 60 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958). This right of anonymity is not, however, unqualified. See United States v. Harris, 347 U.S. 612 (1954) (upholding Federal Lobbying Act requiring registration of paid Congressional Lobbyists and disclosure of contributions); Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913) (upholding the required disclosure of publisher, editor, managers, etc., of newspaper seeking second class mailing privileges); Veterans & Reservists for Peace in Viet Nam v. Regional Comm'r., 459 F.2d 676 (3d Cir. 1972) (upholding licensing requirements of Trading with the Enemy Act); Wirtz v. Fowler, 372 F.2d 315 (5th Cir. 1966) (upholding the Labor-Management Reporting and Disclosure Act requiring report of ac-

tivities of persons hired by employers to influence employees in organizing activities); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) (upholding college regulation requiring advance notice of demonstrations). See also Branzburg v. Hayes, 408 U.S. 665 (1972) (grand jury can require disclosure of newspaper sources).

With full recognition of the state's interest in regulation of the election process, I concur in the conclusion of the majority that article 14.10(b) is unconstitutional in its overbreadth. I reach this decision after due consideration of the authorities cited above as examples of valid disclosure laws. In each instance in which a disclosure statute has been upheld, the statute has been narrowly drawn to regulate only the narrow spectrum of activity that is necessary to protect the state's interest. A private individual under the regime of the valid disclosure laws cited could still

exercise his rights of expression anonymously. Article 14.10(b), however, is not limited to prohibiting election fraud. In seeking merely to facilitate the investigation of such fraud, it prohibits the anonymous publication of not only fraudulent literature, but all campaign literature, whether the contents be true or not. The prohibition of anonymous expression is thus direct and immediate. No individual seeking to have campaign material printed is immune from its application. Under article 14.10(b), it is not necessary that the party subject to the law seek some government benefit, such as second class mailing privileges, or that he be engaged in a specialized occupation, such as a paid lobbyist; nor does the prohibition become operative only if conduct as well as speech is involved, as in the case of a college demonstration. While a law directly prohibiting the publication of fraudulent literature would no doubt be

constitutional, the state simply has no compelling interest in the prohibition of all anonymous campaign literature.

Although the state argues that article 14.10(b) is limited in that it applies only to election activities, I do not find that this limitation is sufficient to pass constitutional muster. Under no circumstances is the right of free expression more important than in the political arena, and no better opportunity is provided for the exercise of these rights than in an election. "[D]ebate on public issues should be uninhibited, robust, and wide-open, [even though] it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times v. Sullivan, 376 U.S. 254, 270 (1964). In the midst of the current zeal to prevent the fraudulent campaign practices that seem to have prevailed in the 1972 election year, legislatures and courts should not lose

sight of that which is most fundamental to our society. The importance of the lone dissenter cannot be overestimated. To undermine the right to speak anonymously is to jeopardize this ability to dissent.

Thus, I am in accord with the view of the majority that article 14.10(b) is unconstitutional insofar as it requires the name of the printer or publisher to be published on all campaign material. Although the printer may have no First Amendment right to conduct his business anonymously, the disclosure of his name is primarily for the purpose of identifying the author or distributor of the printed material and constitutes an abridgment of the latter's First Amendment rights. By virtue of my decision regarding the ability of the plaintiffs to assert the First Amendment rights of others, my consideration of the challenged statute necessarily has been broader than that of the majority. Accordingly, I would hold

further that the statute is unconstitutional in that it requires the name of the person paying for the advertisement to appear on the face of the material and thus abridges his First Amendment rights as well.

DONE at Houston, Texas, this 20th day of August, 1974.

Carl O. Bue, Jr.
United States District
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, and CHARLES DRAKE, individually, and on behalf of all persons similarly situated	CIVIL ACTION
V.	
HONORABLE JOHN HILL, Attorney General of the State of Texas, HONORABLE MARK WHITE, Secretary of State of Texas, and CAROL S. VANCE, District Attorney for Harris County, Texas	NO. 73-H-1261

O R D E R

In accordance with our opinions entered on this date, it is hereby ORDERED and DECLARED that the language of art. 14.10(b) of the Texas Election Code which reads:

> Any printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person paying for the advertising

is unconstitutional and the State of Texas is hereby enjoined from the enforcement of same.

DONE at Houston, Texas, on this the 20th day of August, 1974.

Thomas Gibbs Gee
Circuit Judge

John V. Singleton
United States District Judge

Carl O. Bue, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, and CHARLES DRAKE, individually, and on behalf of all persons similarly situated	I	CIVIL ACTION
V.	I	
HONORABLE JOHN HILL, Attorney General of the State of Texas, HONORABLE MARK WHITE, Secretary of State of Texas, and CAROL S. VANCE, District Attorney for Harris County, Texas	I	NO. 73-H-1261

BEFORE GEE, CIRCUIT JUDGE,
SINGLETON AND BUE, DISTRICT JUDGES.

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

Notice is hereby given that JOHN L. HILL, Attorney General of the State of Texas, MARK WHITE, Secretary of State for the State of Texas, and CAROL S. VANCE, District Attorney for Harris County, Texas, defendants in the above styled and numbered cause, hereby appeal to the Supreme Court of the United

States from the Order declaring that the language of Article 14.10(b) of the Texas Election Code which reads:

> Any printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person paying for the advertising

is unconstitutional, and enjoining the State of Texas from the enforcement of same, entered in this civil action on the 20th day of August, 1974.

This appeal is taken pursuant to Title 28, United States Code, Section 1253.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

PENNY J. BROWN
Special Assistant Attorney General
369 One Main Plaza
Houston, Texas 77002
228-0701

ATTORNEYS FOR DEFENDANTS,
JOHN L. HILL and MARK
WHITE

Joe Moss
Assistant District Attorney
Harris County Courthouse
301 San Jacinto
Houston, Texas 77002

ATTORNEY FOR DEFENDANT,
CAROL S. VANCE

ARTICLE 14.10 Political Advertising

(a) Anything published in a newspaper, magazine or journal or any pamphlet, hand-bill or other printed matter, or anything broadcast over a radio or television station or displayed on a billboard, in favor of or in opposition to any candidate for any public office or office of a political party, or in favor of or in opposition to the success of any public officer, or in favor of or in opposition to any political party, or in favor of or in opposition to any proposition submitted to a vote of the people, in consideration of the receipt or promise of money or other thing of value, shall for the purposes of this section be considered as political advertising. All advertisements of marked ballots, advising or suggesting how voters should mark their ballots, shall be included in the meaning of political advertising.

(b) No political advertising shall be accepted for printing, publication, or broadcasting unless a copy of the matter to be printed or published, signed by the individual contracting therefor and showing his full address and, if he is acting as an agent, showing also the name of the candidate, political committee, or business entity he represents, is deposited with printer, publisher, or broadcaster accepting the advertising. The person accepting the advertising shall preserve the signed copy for a period of one year after the date of the election to which the advertising relates, and shall permit any interested individual to inspect the signed copy at any time during business hours, but only after the advertising has been printed, published, or broadcast. Such advertising shall be labeled as political advertising in the advertisement as printed, published or broadcast. Any printed or published political advertising shall also have printed on it the

name and address of the printer or publisher and the person paying for the advertising.

Any individual, firm, or corporation who violates the provisions of this Section shall be guilty of a felony and upon conviction shall be fined not less than $100 nor more than $5,000 or be imprisoned not less than one year nor more than five years or be both so fined and imprisoned.

(c) Any advertising medium or any officer or agent thereof who willfully demands or receives for any political advertising any money or other thing of value in excess of the sum due for such service at the regular advertising rates of such medium, or any person who pays or offers to pay for such service any money or other thing of value in excess of the sum due at regular advertising rates, or any person who pays or offers to pay any money or other thing of value for the publication or broadcasting of political advertising except as advertising matter, shall be fined not more than one hundred dollars.

(d) Either party to a violation of this section may be compelled to testify regarding thereto, but shall not be punished for any act regarding which he may have been required to testify. [Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 246; as amended Acts 1963, 58th Leg., p. 1017, ch. 424, § 109.] (Emphasis added.)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

October 11, 1974

Elizabeth Levatino, Attorney
Special Assistant Attorney General of Texas
Capitol Station - P. O. Box 12548
Austin, Texas 78711

Re: John Hill, et al. v. Printing Industries of the Gulf Coast, et al.,
No. A-256
USDC SD Texas #73-H-1261

Dear Ms. Levatino:

The Court today entered the following order in the above-entitled case:

The application for stay of judgment of the United States District Court for the Southern District of Texas presented to Mr. Justice Powell and by him referred to the Court, is granted pending the timely docketing of an appeal and final disposition thereon. Mr. Justice Douglas would deny the application.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

Francis J. Lorson
Deputy Clerk

dm

cc: Joe S. Moss, Esq.
Asst. District Attorney

Gerald M. Birnberg, Esq.

Clerk, United States District
Court for the Southern
District of Texas

Supreme Court, U. S.
FEB 6 1975
MICHAEL

APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-456

JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, MARK WHITE, SECRETARY OF STATE OF THE STATE OF TEXAS, AND CAROL VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS

Appellants

V.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, AND CHARLES DRAKE, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Appellees

On Appeal From The United States District Court For The Southern District of Texas

FILED October 21, 1974

PROBABLE JURISDICTION NOTED DECEMBER 23, 1974

TABLE OF CONTENTS

DOCKET ENTRIES 1

NOTATION 8

D O C K E T E N T R I E S

PRINTING INDUSTRIES OF THE
GULF COAST, MARION COLEMAN,
GRADY E. FITCH, AND CHARLES
DRAKE, Individually and on
behalf of all persons simi-
larly situated.

VS. CA 73-H-1261

HON. JOHN HILL, Attorney General
of the State of Texas, and
HON. MARK WHITE, Secretary of
State of the State of Texas
HON. CAROL VANCE, District Atty
for Harris County, Texas (by
amended complaint)

9-11-73	Pltf. FIRST ORIGINAL COMPLAINT SEEKING DECLARATORY JUDGMENT, TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTIONS, AND REQUESTING THE CONVENING OF A THREE-JUDGE DISTRICT COURT, filed. SUMMONS withheld.
9-12-73	(JVS) ORDER setting hearing for Temporary Restraining Order on 9-17-73, filed.

9-12-73	(2) Writs to serve issued
9-17-73	Plaintiffs' FIRST AMENDED ORIGINAL COMPLAINT SEEKING Declaratory Judgment, TRO, etc., filed.
9-17-73	Summons issued for Service on additional Deft., District Atty Carol S. Vance.
9-18-73	(JVS) HEARING ON APPLICATION FOR TRO: Testimony of witnesses, argument of counsel. Application for TRO DENIED.
9-18-73	TRIAL BRIEF IN OPPOSITION TO TEMPORARY RESTRAINING ORDER, filed.
9-18-73	MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER, filed.
9-28-73	Return of Summons on Carol S. Vance, served 9/18/73, filed.
10-9-73	Deft., Hill & White's ANSWER, filed.
10-10-73	Return of Writ to Serve on Atty General John Hill, served 9/21/73, filed (w/order setting hearing)
10-10-73	Return of Writ to Serve on Sec. of State, Mark White, served 9/21/73, filed.
12-10-73	(JRB) ORDER, filed, instituting Three-Judge Court consisting of Hon. Thomas G. Gee, Hon. John V. Singleton, Jr. and Hon. Carl Bue. Parties ntfd. jb
12-19-73	(JVS) MINUTE ENTRY, filed. At in-chambers conference held Dec. 18, 1973, Mr. Joe Moss, representing Carol Vance, advised the court that he will determine whether or not he will file a motion to dismiss; and if so, such motion along with a supporting memorandum of authorities will be filed on or before January 10, 1974. The attorneys are ordered to prepare and file stipulation of facts on or before January 14, 1974 and to submit written briefs on or before January 21, 1974. Thereafter the attorneys will be notified as to when a hearing will be set. Parties ntfd. rm.
1-16-74	Common Cause's MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, filed. M/D 1/21/74
1-21-74	Common Cause's MOTION TO COUNSEL UNDER RULE 1 OF LOCAL RULES, filed. M/D 2/4/74 by Clerk
1-21-74	Amicus Common Cause's BRIEF IN SUPPORT OF CONSTITUTIONALITY OF STATUTE, filed.
1-21-74	APPENDIX TO BRIEF OF AMICUS CURIAE COMMON CAUSE, filed.
1-21-74	Sent Judge Gee and Judge Bue copies of the above Brief and Appendix.
1-24-74	BRIEF FOR DEFENDANTS, filed.
1-24-74	Sent Judge Gee and Judge Bue copies of the above Brief for Defendants.
1-30-74	Plaintiffs' BRIEF ON THE MERITS, filed.
1-30-74	Plaintiffs' and Defendants' agreed STIPULATIONS OF FACT, filed.
1-30-74	Plaintiffs' SUPPORT FOR COMMON CAUSE'S MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, filed.
2-5-74	Sent copies of the above to Judge Gee and Judge Bue.

2-13-74 EXHIBIT A TO PLAINTIFF'S BRIEF, filed.

2-13-74 Sent copies of Exhibit "A" to Judge Gee and Judge Bue.

2-14-74 APPLICATION OF AMICUS CURIAE COMMON CAUSE TO PARTICIPATE IN ORAL ARGUMENT, filed.

2-15-74 EXHIBITS TO DEFENDANT'S BRIEF, filed. Sent copies.

2-20-74 (JVS) ORDER, filed. granting representation of counsel on motion for leave to appear in this cause for Amicus Curiae Common Cause, parties ntfd. jab

2-20-74 (JVS) ORDER, Filed granting leave to participate in oral argument of no longer than 15 minutes, or such greater or lesser time as the Court shall direct to Amicus Curiae Common Cause. Parties ntfd. jb

2-20-74 (JVS) (TGG) (COB) HEARING to Determine Constitutionality of State Statute Held. Appearances: Gerald M. Birnberg for pltf.; Penny J. Brown for Defts.; David Crump-Amicus Curiae Common Cuase. Mr. Crump allowed to argue in this case only though not admitted. 9:45 a.m. - 12:05 p.m. Argument of counsel (Case concluded) rlo

2-20-74 Texas Daily Newspaper Association and Texas Press Association's MOTION TO ALLOW FILING AND CONSIDERATION OF THE ACCOMPANYING AMICUS CURIAE BRIEF, filed.

2-26-74 American Civil Liberties Union as Amicus Curiae's BRIEF, filed

3-4-74 (JVS) MINUTE ENTRY, filed, granting motion of Texas Daily Newspaper Association and Texas Press Association to file their Amicus Curiae Brief. Parties ntfd. jab

3-4-74 Texas Daily Newspaper Association and Texas Press Association's AMICUS CURIAE BRIEF, filed.

4-1-74 Amicus Curiae Common Causes's MOTION FOR LEAVE TO FILE REPLY TO OTHER AMICUS BRIEFS RECENTLY FILED, filed.

4-12-74 (JVS) MINUTE ENTRY, filed. Motion of Amicus Curiae Common Cause for leave to file reply to other amicus briefs of the ACLU and Texas Daily Newspaper Association is GRANTED. Parties ntfd.

4-18-74 REPLY OF AMICUS CURIAE COMMON CAUSE TO BRIEF OF TEXAS DAILY NEWSPAPERS ASSOCIATION AND TEXAS PRESS ASSOCIATION, filed.

4-18-74	REPLY OF AMICUS CURIAE COMMON CAUSE TO BRIEF OF AMERICAN CIVIL LIBERTIES UNION, filed.
4-22-74	Pltfs' POST SUBMISSION MEMORANDUM, filed.
6-11-74	Amicus Curiae Common Cause's REPLY TO POST-SUBMISSION MEMORANDUM OF PLAINTIFF PRINTERS, filed.
6-21-74	Pltf. Printers REPLY MEMORANDUM TO AMICUS CURIAE, COMMON CAUSE'S BRIEF, filed.
8-20-74	(JVS)(TGG)(COB) OPINION, filed. Parties ntfd. rm.
8-20-74	(JVS)(TGG)(COG) Order, filed. In accordance with the opinions entered this date the language of Art. 14.10(b) of the Texas Election Code which reads: "Any printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person paying for the advertising" is declared unconstitutional and the State of Texas is hereby enjoined from the enforcement of same. Parties ntfd. rm.
8-23-74	Deft's Notice of Appeal to U.S. Supreme Court, filed.

8-23-74	Deft's Motion for Stay Pending Appeal, filed.
8-27-74	Pltfs' OPPOSITION TO DEFENDANTS' MOTION FOR STAY PENDING APPEAL, filed.
9-23-74	(JVS) ORDER, filed, denying Motion for Stay Pending Appeal. Parties ntfd. rm.

N O T A T I O N

The following items appear in the appendix to the Jurisdictional Statement at the pages noted and are not reprinted in this appendix:

Opinions of the lower court..... 1

Majority Opinion 1

Bue, District Judge,

specially concurring 42

Order of the Court 60

Supreme Court, U. S.
FILED
DEC 5 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-456

HON. JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, HON. MARK WHITE, SECRETARY OF STATE OF THE STATE OF TEXAS, and HON. CAROL S. VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS,

Appellants,

VS.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY FITCH AND CHARLES DRAKE, Individually, and on behalf of all persons similarly situated,

Appellees

APPELLEES' MOTION TO AFFIRM

GERALD M. BIRNBERG
JAMES T. EVANS
5959 West Loop South
Suite 606
Bellaire, Texas 77401
(713) 664-7782
MICHAEL ANTHONY MANESS
1955 Richmond
Houston, Texas 77006
(713) 529-3134
Attorneys for Appellees

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-456

HON. JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, HON. MARK WHITE, SECRETARY OF STATE OF THE STATE OF TEXAS, and HON. CAROL S. VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS,

Appellants,

vs.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY FITCH AND CHARLES DRAKE, Individually, and on behalf of all persons similarly situated,

Appellees

APPELLEES' MOTION TO AFFIRM

To the Honorable Justices of the United States Supreme Court:

COME NOW the Appellees in the above captioned case and file this their Motion to Affirm the judgment of the Three-Judge District Court rendered August 20, 1974, and in support thereof would respectfully show unto this Honorable Court as follows:

STATEMENT OF THE CASE

The most serious dangers to constitutional liberties come not from evil-minded rulers whose malevolent motives and tyrannical actions are all to obvious, but from beneficient,

well-meaning individuals who, in their zeal to achieve socially desirable ends, allow subtle but insidious encroachments upon precious freedoms, often in a manner appearing relatively unobstrusive or insubstantial, but oblivious to the inevitable cataclysm born of the continued gradual erosion of fundamental rights. That basic principle is what this case (indeed, all cases regarding First Amendment limitations on governmental action) is all about — the ominous threat to our Bill of Rights posed by a superficially inocuous State statute conceived by men of the highest motives, but facially incompatible with the dictates of the First Amendment.

HISTORY OF THE CASE

In 1973, the 63rd Legislature of the State of Texas enacted House Bill No. 4, amending Article 14.10(b) of the Texas Election Code to provide as follows:

> "Any printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person paying for the advertising."

The amendment became effective on June 14, 1973, and provided sanctions for its violation by fine of not less than $100 nor more than $5,000 or imprisonment not less than one year nor more than 5 years or both such fine and imprisonment.

On September 11, 1973, less than three months after the new law had become effective, and before any major elections to which it would apply, the Appellees herein filed suit in the Southern District of Texas alleging that the above quoted provision of Article 14.10(b) as amended is unconstitutional and void on its face because of its interference with the Appellees' rights to political and associational privacy and anonymity (as established by *Talley* v. *California,* 1960, 362 U.S. 60, 80 S.Ct. 536, 4

L.Ed.2d 559; and *NAACP* v. *Alabama,* 1958, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488); because of its abridgment of freedom of the press (cf. *Miami Herald Publishing Co.* v. *Tornillo,* 1974 U.S. , 94 S.Ct. 2831); and because of its vagueness and imprecision. The Appellees alleged under oath and subsequently presented uncontradicted testimony to substantiate that they had reason to fear and did fear that they would suffer intimidation, harassment and reprisals if they were required to associate themselves openly and publicly with particular political candidates or positions in the manner required by the statute, that the statute possesses an inherent and substantial danger that persons seeing the Appellees' names on political advertising would mistakedly believe that the Appellees were thereby endorsing that candidate or political position, and that the statute had an unconstitutional and irreparable "chilling effect" on the exercise of First Amendment rights. In addition, the Appellees alleged that they were unable to determine the exact requirements of the penal statute because the term "person paying for the advertising" is not defined and, therefore, the Appellees were unable to ascertain whether such term refers to advertising agencies, individual advertising agents, political committees, their chairmen, political donors, political candidates, or some other individual or entity.

Pursuant to 28 USCA §§2281 and 2284, a Three-Judge District Court was convened and a hearing was held on February 20, 1974. Multitudinous and voluminous briefs were filed by Appellants, Appellees and Amici Curiae, and on August 20, 1974, the Three-Judge District Court rendered a 40-page opinion agreeing with the Appellees' constitutional claims on all points and unanimously declaring the amendment to Article 14.10(b) to be unconstitutional in each respect urged by the Appellees. An Order embodying that opinion, declaring the statute unconstitutional and enjoining its enforcement was also rendered on August 20, 1974.

The Court below considered the arguments in depth and concluded:

> "The first amendment rights to freedom of speech and press exist not only because the authors of the Bill of Rights wished to humor the eccentricities of the man on the soap box but because they wished to secure forever the *means* of making the United States a free market place of ideas. The human voice and the human pen are vital to this goal but no more vital than the physical printing press itself and the persons who operate it. All of these rights exist because of the same goal. Who can say that in achieving the goal any one element is more important or that because one element has commercial aspect it lacks standing to protect itself. All of these rights are so closely bound together that the goal they were created to achieve will fail should any one be curtailed. To say that the right of the printer physically to print the written word can be distinguished from the right of the author to have his words printed because the printer has no interest in the ideas he prints (his interest being in receiving a fee for his printing) is to ignore not only the clear language of the first amendment but the scheme behind that amendment." Court's Opinion at p. 3.
>
> • • • •
>
> "It is important to realize this when treating the instant case because in our zeal to secure individual first amendment rights it often becomes hard to see that the ideal of free men governed by free men is just as dependent upon the vehicle of free speech — a free press. Not just the freedom to write one's own tract, print it in one's basement, and distribute it on the street corner is at stake but the freedom to go to a printer in the business of printing what comes over the counter, pay him, and have printed one's tract is at stake. The purpose of the first amendment was to protect the person who only operates the press as much as the author-printer, not so much because otherwise the commercial printer might lose money but because without the printer many an author could not disseminate his ideas. Unless the mere printer has a right which is

> greater than that of the ordinary businessman, not only his self-interest will be harmed but the purpose of the first amendment will be defeated. It is in the public interest to keep printers in business and to keep speakers and writers speaking and writing. That public interest has historically been assertable not only by the individual author and speaker but by the printer and publisher as well."

Court's Opinion at p. 8.

ARGUMENT AND AUTHORITY

I.

ARTICLE 14.10(b) OF THE TEXAS ELECTION CODE UNCONSTITUTIONALLY INFRINGES UPON APPELLEES' RIGHTS TO POLITICAL AND ASSOCIATIONAL PRIVACY AND ANONYMITY, GUARANTEED TO THEM BY THE FIRST, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At least two distinct rights are involved in this case — freedom to print political material anonymously (encompossed in freedom of the press and freedom of speech) and the right to associate privately (included within the right to assemble).

The Right to Print Anonymously

That there exists a constitutional right to print political material anonymously cannot be seriously contested, particularly when due consideration is given to historical perspective. It is obvious why the Founding Fathers intended associational and political privacy to be zealously preserved — had the publisher of Thomas Paine's *Common Sense* been required to print his name and address on that political leaflet, or had Alexander Hamilton been prohibited from distributing his political writings without disclosing

the name of the person paying for his anonymous publications, we might not have a Bill of Rights to be preserving today. Indeed,

> "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of the printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Liburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictious names." *Talley* v. *California,* 1960, 362 U.S. 60, 64-65, 80 S.Ct. 536, 538-39, 4 L.Ed.2d 559.

Thus, of historical necessity, freedom of the press encompasses freedom to print anonymously. Any other reading of the First Amendment is to betray the lessons of history at a cost of inviting tyranny. Accordingly, any statutory enactment which requires the source of political material to be publicly revealed is automatically suspect.

That this constitutional guarantee is as vital today as it was 200 hundred years ago is made unequivocally clear by Mr. Justic Black's opinion for the Court in *Talley* v. *California, supra.* In that case, the Court reviewed and declared "facially unconstitutional" a Los Angeles municipal ordinance which required that handbills have printed on them, among other things, the name and address of the person who printed, wrote, compiled or manufactured the leaflet. "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression," Justice Black wrote. "[E]xposure of the names of printers, writers and distributors would lessen the circulation of literature critical to the government." *Talley, supra,* 362 U.S. at 64, 80 S.Ct at 538. See also *Zwickler* v. *Koota,* 1966, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed2d 444, on remand, Three-Judge District Court, S.D.N.Y., 1968, 290 F.Supp. 244, *vacated as moot* sub. nom. *Golden* v. *Zwickler,* 1969 394 U.S. 1031, 89 S.Ct. 956, 22 L.Ed.2d 113; *Opinion of the Justices,* Mass., June 29, 1972, 41 L.W. 2020; *New York* v. *Duryea,* N.Y. S.Ct. [42 L.W. 2420, January 24, 1970].

Article 14.10(b) ignores these teachings and contravenes the principal that printers of political publications are constitutionally immune from being required to disclose publicly their identities. The printers have alleged and proved that public disclosure of the name of printers of political materials results in economic and other reprisals against the printers by supporters of the opposing political view. Moreover, they demonstrated under oath a legitimate, bona fide fear of intimidation, harassment and reprisal, if required to print their names on all political advertising. On its face Article 14.10(b) demands that printers of political advertising abandon their rights to print anonymously if they choose to exercise their right to print such material. Plainly, such a requirement is inconsistent with the lessons of the past and incompatible with

the Bill of Rights, which wisely in the light of historical perspective, guarantees the printers the right to print political matter without revealing their identity.

The Right to Associational Privacy

There is a second way in which Article 14.10(b) infringes on the Printers' constitutional rights. Not only does it deprive them of the right to print anonymously, it also inhibits their rights to associational privacy. The statute requires that a printer publicly disclose that he has, in whatever manner, supported a particular candidate or position. The printer cannot avoid revealing that he has assisted that particular candidate or political group in some manner — at the very least, by not refusing to undertake political advertising printing for them. By inevitably producing this result of disclosing political association, the statute contravenes the teachings of a long line of Supreme Court cases protecting individuals against disclosure of their political affiliations.[1] See *N.A.A.C.P.* v. *Alabama,* 1958, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488; *Bates* v. *City of Little Rock,* 1960, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480; *Louisiana ex. rel Gremillion* v. *N.A.A.C.P.,* Three Judge, E.D.La., 1961, 181 F.Supp. 37, *aff'd.,* 366 U.S. 293, 81 S.Ct. 1336; *Gibson* v. *Florida Legislative Committee,* 1962, 372 U.S. 539; *Shelton* v. *Tucker,* 1960, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231; *Pollard* v. *Roberts,* E.D.Ark., 1968, 283 F.Supp. 248, *aff'd.,* 393 U.S. 14; *Lamont* v. *Postmaster General,* 1965, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398; *DeGregory* v. *United States,* 383 U.S. 825, 86 S.Ct. 1148, 16 L.Ed.2d 292; *United States Servicemen's Fund* v. *Eastland,* D.C.Cir., 1973, 488 F.2d 1253, cert.

[1] The right to associational privacy runs two ways – it precludes the state from demanding membership information from the association (as in *N.A.A.C.P.* v. *Alabama* and *Bates* v. *City of Little Rock*) and it also prevents the State from requiring the individual to reveal the organization of which he is a member (as in *Shelton* v. *Tucker* and *Lamont* v. *Postmaster*).

granted sub. nom. *Eastland* v. *U.S. Servicemen's Fund,* Oct. 15, 1974, 43 L.W. 3208.

"The rationale of those decisions is that the First and Fourteenth Amendments protect rights to associate together to advocate and promote legitimate albeit controversial, political, social or economic actions; that when the objective of the group or the group itself is unpopular at a given time or place, revelation of the identities of those who have joined themselves together or have affiliated with the group may provoke reprisals from those opposed to the group or its objectives; and that the occurrence or apprehension of such reprisals tends to discourage the exercise of the rights which the Constitution protects." *Pollard* v. *Roberts, supra,* 283 F.Supp. at 256.

Moreover, "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an]***effective***restraint on freedom of association***. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations***. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP* v. *Alabama, supra.* Not only the Courts but also the commentators have generally conceded the obvious — that "forcing a man to disclose his identity may have such a powerfully deterrent effect upon the exercise of political rights as to render them meaningless." Redish, Campaign Spending Laws and the First Amendment, 46 N.Y.U.L.Rev. 900, 934 (1971). See also Campaign Financing, 9 Harv.J.L. 359, 405 (1972). One primary cause of political apathy is said to be the serious fear that open political involvement may tend to alienate friends, neighbors and employers. Rosenberg, Some Determinants of Political Apathy in American Democracy: Esays on Image and Realities 28, 29-30 (1964). Embarrass-

ment, reprisal and other direct harms from public participation in political activities are evident and repressive. The fear of losing customers by appearing to support a candidate or position opposed by the customer is real and pressing to the printers, as common sense would indicate. More importantly, it is the small printer — the "little man" — who can least afford to offend his customers. Article 14.10(b) requires that he take this and other risks, however, if he chooses to exercise his constitutional right to print political material.

In doing so, Article 14.10(b) infringes rights to associational privacy. In the first place, as the evidence in this case shows, there is a substantial probability that persons seeing printers' names on political advertising will mistakely consider the disclosure an endorsement of that candidate by the printers. Secondly, the statute requires that the printer reveal that he has been of some assistance to the candidate, whether the printer desires that fact be publicly known or not. The choices posed by the statute are intolerable — either avoid the possibility of reprisal by refusing to undertake political advertising or abandon constitutional rights of associational privacy. The first choice produces a classic example of the "chilling effect" doctrine; the latter results in direct abridgement of fundamental rights.

> "In the midst of the current zeal to prevent the fraudulent campaign practices that seem to have prevailed in the 1972 election year, legislatures and Courts should not lose sight of that which is most fundamental to our society. The importance of the lone dissenter cannot be overestimated. To undermine the right to speak anonymously is to jeopardize this ability to dissent."

Concurring Opinion at p. 8.

Thus, as has been seen, Article 14.10(b) plainly encroaches on First Amendment rights. It ignores the fundamental right to print anonymously (a necessary concomitant of freedom of the press) and it requires disclosure of participation in political activities in derogation of rights to political and associational privacy, necessary corollaries of the First and Ninth Amendment freedoms to assemble. Its unconstitutionality is, as the Three-Judge District Court unanimously concluded, transparent.

Consideration of State Interest

Of course, the fact that a particular statutory enactment infringes upon constitutional liberties, does not automatically render the statute invalid. On the other hand, state action infringing upon the exercise of First Amendment rights cannot be sustained unless the governmental interests asserted to support such impingement are "compelling" and the State has shown that no alternative forms of regulation would combat the abuses without infringing First Amendment rights as severely. *Shelton v. Tucker,* 1960, 364 U.S. 479, 487-490, 81 S.Ct. 247, 251-253, 5 L.Ed.2d 231; "When legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have 'less drastic' impact on the continued vitality of First Amendment freedoms." *United States* v. *Robel,* 1967, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508.

Several state interests purportedly furthered by Article 14.10(b) are urged by the Appellants as legitimizing justifications for Article 14.10(b)'s undeniable encroachment upon First Amendment liberties. As will be seen, however, all of these concerns have been previously considered by the Courts in the context of First Amendment cases and all of them have been held insufficient to justify curtailment of constitutional guarantees of political anonymity and associational privacy.

Intially the state contends that Article 14.10(b) furthers the salutory effect of purifying the electoral process by pro-

viding a means of identifying persons responsible for fraudulent, deceitful, libelous, obnoxious or falsely attributed statements in a political campaign.[2] Interestingly, the State of Texas has not made any of these activities criminal by any statutory enactment other than Article 14.10(b), and that statute allows such conduct so long as the printer and the person paying for the advertising identify themselves. This absence of affirmative penal sanctions for the conduct allegedly exposed by Article 14.10(b) strongly suggests that the State's interest in this type of activity is neither as overwhelming nor as "compelling" as the Appellant might suggest. *Cf. Roe* v. *Wade,* 1973, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 at note 54 (fact that Texas has no other penal statutes protecting the life of a fetus rendered state's asserted interest in protecting prenatal life suspect).

Assuming, however, that the State of Texas possesses a legitimate desire to ferret out this kind of activity (an assumption rebutted by the dearth of other legislative activity prohibiting such conduct), *Talley* v. *California* considered precisely that state justification for a printer disclosure requirement and found it insufficient to overcome the printers' First Amendment rights to anonymity. In that case the state had argued that the ordinance was aimed at the prevention of "fraud, deceit, false advertising, negligent use of words, obscenity and libel," all of which were summarized by Mr. Justice Harlan as being "of an obnoxious character." The Court invalidated the statute nonetheless, and Article 14.10(b) suffers the same infirmity as the Los Angeles Ordinance struck down in *Talley* — neither statute is limited in its broad prohibitions to these obnoxious ac-

[2] Professor Emerson argues that, in general, "purification" efforts conflict with First Amendment Rights and are hence invalid. See T. Emerson, Toward a General Theory of the First Amendment 103-105 (1966).

tivities. Both enactments require printer identification on *all* political advertising, not merely that which is false, fraudulent, misleading or falsely attributed.[3]

The *Tally*-born rejection of identifying sources of obnoxious campaign material as a justification for infringement of First Amendment rights was underscored by the Three-Judge Court in *Zwickler, supra.*

> "It is true — if one were to follow Defendant's reasoning — that if every colporteur were constrained by statute to disclose whose money it was that paid the printer of the tract he hawks, the information thus extruded might in some instances blaze a trail to a criminal source or misuse of funds. A constitutional right of those privileged to speak with anonymity unbreached, however, may not be disregarded to facilitate the prosecution of others who by their offending may have forfeited that right.
>
> The current attitude of the Courts is to place the emphasis on the protection and preservation of the freedom of the many to advocate conduct or to reprehend misconduct in public affairs, not to redress the wrongs, real or fancied, of the individual office holder or aspirant for what is uttered concerning his past or prospective management of those affairs." *Zwickler* v. *Koota, supra,* 290 F.Supp. at 253-54.

The conclusion that the interest asserted by the state is insufficient to allow derogation of the printers' First

[3] Admittedly, Article 14.10 is somewhat limited by its application only to "political advertising", while the *Talley* ordinance encompassed all handbills, whether dealing with political matters, religious matters, commercial matters or otherwise. On the other hand, the *Talley* ordinance applied only to handbills, while Article 14.10(b) covers all types of political advertising, including billboards, handbills, books, campaign buttons, t-shirts and all other forms of printed campaign paraphernalia. Moreover, to the extent that certain types of speech are protected more avidly than others by the First Amendment, certainly *political* discussion deserves the broadest immunity from governmental intrusion of all kinds of speech. *New York Times* v. *Sullivan,* 1964, 376 U.S. 254; *New York Times Co.* v. *United States,* 1972, 403 U.S. 713. Cf. *New York* v. *Duryea, supra.*

Amendment rights is bolstered substantially by the fact that there are alternate means available to the state for effecting this very purpose without damaging the printers' constitutional rights so devastatingly. For example, a law prohibiting the dissemination of falsely attributed campaign material would effectively serve that state interest without requiring the printers to surrender rights to print anonymously. Similarly, a requirement that the printers supply a copy of all political advertising to a central depository where the identity of the printer would be available to interested persons would at least substantially minimize the deleterious effects inherent in the present law of widespread public dissemination of the printer's identity. Although such a scheme would encroach somewhat on the printers' rights of anonymity, it would materially reduce the substantial danger inherent in the present law that persons seeing Appellees' names on political advertising of particular candidates will mistakedly consider such association an endorsement of that candidate by the Appellees. Thus, this scheme would less drastically interfere with the Appellees' First Amendment rights, though some intrusion would be present nonetheless.

Thirdly, the state could provide for a coded number "bug" system similar to that presently used to identify union printers. In this system, each printer who undertook political advertising would be assigned a number and that number would appear on all political advertising printed by him. Any interested person could readily ascertain the name and address of the printer assigned that number. Again, the effect of such a scheme would be to minimize substantially the likelihood of reprisal or public misconception fostered by the present law.

Unless the state can persuasively demonstrate that these less restrictive means would not adequately further the

interests asserted, Article 14.10(b) must be declared unconstitutional.

A second justification posed in support of Article 14.10(b) is that it allows the voters to be informed about who is supporting particular political candidates or positions. Assuming for the moment that the voters have a right to know the name of the person paying for the political advertising, there is absolutely no reason why the public needs to be informed about the name and address of the printer, unless the public is supposed to infer that the printer supports that particular candidate or position. Here the state is in a hopeless dilemma. Either the statute suggests that the printer supports the candidate (in which case rights of associational privacy are clearly violated and the *NAACP* line of cases controls) or the requirement of printer identification does not provide the voters with any useful information (in which case this justification for the statute fails).[4]

At all events, the "informed voted" justification for allowing encroachment on First Amendment rights has been specifically considered and rejected by this Court. In *Andersen* v. *Martin,* Three-Judge Court, M.D.Ala., 1962, 206 F.Supp. 700, the Plaintiffs had challenged a Louisiana statute which required the race of a political candidate to be printed on the ballot. The District Court had upheld the law (despite the vigorous dissent of Judge Wisdom) on the grounds that the state could legitimately assist the voters in obtaining information about political candidates. The Supreme Court summarily reversed, declaring the statute clearly unconstitutional. The "informed voter" ra-

[4] The printers have specifically not objected to the requirement that the name of the person paying for the advertising be printed thereon, except to the extent that such phrase is ambiguous and manifestly in need of clarification as to its precise requirements.

tionale was plainly insufficient to justify the infringement of First Amendment rights. *Andersen* v. *Martin,* 1962, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430.

In *Thomas* v. *Collins,* 1944, 323 U.S. 538, 65 S.Ct. 315, 89 L.Ed. 445, the "informed public" argument was again considered and rejected. In that case the State had required public speakers to register in advance and disclose certain basic information about themselves. The justification proferred by the State was that this modicum of information would assist the public in evaluating the speaker's comments by enlightening them of their background. The Supreme Court invalidated the ordinance, on First Amendment grounds, however, despite its service to the "informed public" function. See also, *DeJonge* v. *Oregon,* 1937, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278.

The same result was reached most recently in *Lewis* v. *Baxley,* Three-Judge Court, M.Ala., 1973, 368 F.Supp. 768. In that case the Court invalidated a state statute requiring newsmen to disclose their interest in pending legislation. The State argued that this law provided information to the public on the newsmen's interests, so that the news reported could be properly evaluated by considering the bias of its source. The "informed public" function was undoubtedly served by the statute, but it was struck down nonetheless because the disclosures required violated First Amendment rights.

A third justification offered in support of the present statute is that it assists political candidates in replying to campaign accusations. Again, this justification has been considered and rejected by judicial authority. The argument was raised and swiftly rejected in *Koota, supra*: "Government assistance to a public figure, however, in ferreting out a "producer" whom he may the more easily identify and from whom he may secure damages as balm for his individual loss at criticism of his official performance weighs in the balance as too high a price to be exacted for First Amendment freedom of expression for all. The freedom to animadvert upon the public figures and affairs primes all others." 240 F.Supp. at 252-53. While the opportunity to reply to political accusations is certainly desirable, that opportunity in no way requires widespread public dissemination of the identity of a printer. Either the "bug" system or the centralized depository system mentioned above would allow a slandered candidate the ability to trace the source of the fraudulent campaign material without the dangers inherent in wide-spread dissemination of the printers identity on all political advertising. False attribution could be made a crime, precluding Segretti-type activities without infringing upon the printers' constitutional rights. In sum, the opportunity to reply can be sufficiently protected without the inhibiting requirement of widespread public disclosure of the printer's name and address.

Moreover, this Court has only recently considered at length and unanimously rejected "right to reply" arguments as justification for infringement on First Amendment rights of printers. In *Miami Herald Publishing Co.* v. *Tornillo,* 1974, U.S. , 94 S.Ct. 2831, this Court resoundingly disapproved a Florida "right to reply" statute because of the blatant unconstitutionality of requiring a newspaper printer to print that which he chose not to print.

The same result was reached in *Mills* v. *State of Alabama,* 1966, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed. 2d 484. In *Mills,* Alabama had passed a law barring newspaper editorials on election issues or candidate on election day. The state had argued that this enactment was promulgated to insure that all candidate had an opportunity to reply to any political accusations. The Supreme Court rejected this justification, however, declaring that "it is difficult to conceive of a more

obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." Obviously, there is no material difference, so far as the First Amendment is concerned, between restricting what the press may print and affirmatively requiring that the press print particular matter. In either case, the justification of affording an opportunity to reply is insufficient to overcome the dictates of the First Amendment that there be no law enforced which "abridges" freedom of the press.

The fourth justification proferred in support of the Texas Election Code provision here contested is that it deters Segretti-type and Insco-type campaign "dirty tricks." The State of Texas, however, has not directed its penal sanctions against perpetrators of such illicit campaign mischief, but rather against the printers. *Lewis* v. *Baxley,* Three-Judge Court, M.D.Ala., 1973, 368 F.Supp. 768 demonstrates the inefficacy of this approach. In that case the State of Alabama had required that newsmen file a statement of economic interest stating that they were not employed by any employer having legislation pending before the state legislature. The State had argued that the enactment had deterred surreptitious lobbying by persons purporting to be members of the press. Admitting that deterence of unlawful lobbying constituted a legitimate state interest, the Court nonetheless invalidated the Alabama statute with the following remarks:

> "A part of the requirement of a substantial nexus • • • is the requirement that the State pursue its governmental interests narrowly rather than broadly.
>
> In the context of this case, that requirement means that the State may regulate lobbying and lobbyists as such, but the State may not require disclosure from occupational groups virtually at random upon the theory that one or more members may be lobbyists. If this is the governmental interest to be protected, the State should make its attack upon lobbyists as such."

That same reasoning applies to Article 14.10(b). If the State desires to prevent or deter campaign dirty tricks it should make its attack directly upon the perpetrators. To paraphrase *Lewis,* the State may not require disclosure from occupational groups [printers] virtually at random upon the theory that one or more members may be conduits to unethical campaign activities. Such an approach sweeps too broadly, where First Amendment liberties are at stake, and narrower, less restrictive means must be adopted. Requiring all printers of political advertising to identify themselves, at the risk of reprisal and intimidation, because a few printers may be used by unethical candidates to further illegitimate purposes is a remedy far more harmful than the malady allegedly cured.

Appellants' Cases

The Appellants' reliance on early cases (*Burrough & Cannon* v. *United States,* 1934, 290 U.S. 534; *Lewis Publishing Co.* v. *Morgan,* 1913, 229 U.S. 288; and *United States* v. *Harriss,* 1954, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989) to support Article 14.10(b) is misplaced. The *Lewis Publishing Co.* case, decided in 1919, upheld an Act of Congress requiring any newspaper using the second-class mails to publish the names of its editor, publisher, owner and stockholders. The case was decided not on First Amendment grounds, but on the basis of Congress' plenary powers to control the mails. The Court simply decided that Congress' power to regulate postal service encompassed the authority to insure that organizations taking advantage of reduced rates for second-class mail came within the class of persons entitled to such cut-rate benefits. The law there challenged applied only to users of second-class mail privileges and did not require disclosure except by persons desirous of availing themselves of the benefits of lower mail costs.

The *Burroughs* case is similarly inapplicable here since the sole constitutional challenge presented in *Burroughs* concerned an alleged interference with the power of the state to appoint electors. No First Amendment issues were even considered in *Burroughs*.

With regard to *Harriss*, the significance of that case is in its *limiting* construction of the term "lobbying" as used in the Federal Lobbying Act so as to avoid widespread loss of political anonymity. The *Harriss* case must be viewed in light of the question it posed, namely whether the term "lobbying" should be broadly construed to impose registration requirements upon all persons whose activities directly or indirectly influenced the passage or defeat of any legislation, or narrowly, as the Court did, to encompass only direct communications with members of Congress. The Court chose the more restricted interpretation. The effect of *Harriss* was, therefore, to limit the authority of Congress to intrude upon First Amendment rights to political anonymity, not to expand them. See *NAACP* v. *Alabama, supra*, 78 S.Ct. at 1171; *Zwickler* v. *Koota, supra*, 290 F.Supp. at 255.

This reading of *Harriss* is reinforced by the case of *United States* v. *Rumley*, 1953, 345 U.S. 41, 73 S.Ct. 543, 97 L.Ed. 770. In that case the Defendant had refused to disclose to a House Select Committee on lobbying activities the names of the persons who made bulk purchases of his books. In order to avoid the "serious constitutional questions" regarding acknowledged First Amendment interest in political anonymity,[5] the Court defined the

[5] "Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment." *Rumley, supra*, 345 U.S. at 46, 73 S.Ct. at 546, 97 L.Ed. 770.

term "lobbying" as restrictively as possible so as to exclude Rumley's activities from the scope thereof and render consideration of the constitutional argument unnecessary. It is the same limiting definition process which *Harriss* represents as is evident from the Supreme Court's reliance on and interpretation of *Harriss* and *Rumley* in *N.A.A.C.P.* v. *Alabama, supra*, 357 U.S. at 461, 78 S.Ct. at 1171, citing those cases as standing for the principle that enactments threatening to abridge rights to political anonymity must be narrowly construed so as to avoid that result. See also, *Zwickler* v. *Koota, supra*, 290 F.Supp. at 225. *Harriss* does not, as the Defendants imply, sanction political identification enactments; it limits them.[6]

The only two recent cases which offer even remote support for the Defendants' position are *United States* v. *Scott*, N.D.Dak., 1961, 195 F. Supp. 440, and *United States* v. *Insco*, M.D.Fla., 1973, 365 F.Supp. 308. Neither of those cases is controlling or persuasive here, however, and both are distinguishable. In the first place, it should be noted that both cases are single Judge district court cases with no appellate history. More importantly, both cases involve the Federal Attribution Statute, 18 U.S.C.A. § 612. That statute is significantly different from the Texas Article 14.10(b) in at least two important respects: (1) The Federal Attribution Statute requires disclosure of the name of the persons "responsible" for the publication and the names of the officers of each such association. Thus, it is directed against active participants in a high level federal election campaign whose anonymity, as a practical matter, is generally nonexistent anyway. At all events, the Federal act is directed

[6] To the extent, if any, that *Harriss* can be read as approving some form of disclosure provisions despite First Amendment mandates, it was, of course, severely limited by the Supreme Court's subsequent decision in *Talley, supra*. See Redish, supra, 46 N.Y.U.L.R. 900,929.

toward the perpetrators of illicit activities, not the persons incidentially involved (such as printers). (2) The Federal statute is applicable only with regard to the offices of President, Vice President, Senator, Representative or Resident Commissioner to Congress. These are, of course, the highest political offices in the land. With so much at stake, the constitutional considerations weigh differently.

Thus, none of the interests conjured up by the State possess the requisite urgency to justify derogation of the Printers' First Amendment rights to print anonymously and associate privately. Indeed, alternative means are available to achieve each of the interests asserted by the State without the widespread impairment of constitutional liberties inherent in Article 14.10(b). In sum, the requirements of Article 14.10(b) are dangerously incompatible with the dictates of our Bill of Rights. Accordingly, the Three-Judge District Court correctly held the statute to be unconstitutional.

II.

ARTICLE 14.10(b) IS VOID FOR VAGUENESS IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

Two overpowering clarity gaps riddle Article 14.10(b).

(1) *Who is the "person paying for the advertising"?* This phrase could reasonably encompass any of a number of individuals. For example, it could refer to the advertising agency paying the candidate's bills; or it could contemplate identification of the campaign organization represented by the ad agency; or it could mean the person making a political donation earmarked for political advertising; or it could refer to the individual signing the check, or the messenger boy delivering it, or the candidate in

whose behalf the payment is really made. Confusingly, each of the several interests asserted by the state in support of the statute suggest a different answer to this perplexing question. Thus, if the legislature was seeking to prevent fraud, slander, and other obnoxious campaign material, the name of the campaign committee, organization or association from whose coffers the money ultimately came might be the appropriate party to list as the person paying for the advertising. On the other hand, if the purpose of the statute is to inform the voters of the source of a particular candidate's support, the initial contributor would be the appropriate person to identify as the person paying for the advertising. If, on the other hand, the purpose of the statute is to help the voter evaluate campaign material, the fact that the ad was designed by a particular advertising agency may be the disclosure contemplated by the statute. To the extent that the law is aimed at exposing the perpetrators of campaign dirty tricks, the individual within the campaign organization who was responsible for the particular ad would be the individual referred to by the statute (assuming that such individual was in any manner responsible for paying for the ad, which may not be the case in a large campaign using a voucher expense system). Finally, if Article 14.10 (b) is meant to provide an opportunity to reply, the name of the candidate on whose behalf the ad was paid for would be the proper party to identify as "the person paying for the advertising".

Dramatically underscoring the vagueness of the statute, the Defendants in their Brief in the lower court insisted that the "person paying for the advertising" "would, a fortiori, be either the candidate, his campaign manager or assistant campaign manager, or the campaign manager of a political committee" (excluding the advertising agent or

agency). Amicus Curiae supporting the Defendants, Common Cause, (which had drafted the legislation in the first place) disagreed in their Brief, insisting that "the person paying for the advertising" is the person "who has given the check that pays them" (i.e. the advertising agent, advertising agency or campaign donor). In its Application for Stay, the Petitioners suggested still another possible interpretation of the phrase:

> "It could be the person giving the money to the printers and publishers, the person, if paid by check, signing the check, the campaign manager of a campaign who under the Election Code is one of the persons entitled to authorize expenditures."

In the words of the Three-Judge District Court:

> "Article 14.10(b) which carries with it criminal penalties must be more explicit. The printers must not be left to a guessing game.
>
> The definition of 'persons paying for the advertising' should be left to the legislature for definition but as the statute now stands complying with it is *almost impossible* because it is 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . .'" (emphasis added),

Court's Opinion at p. 30.

(2) *What is a "publisher"?* Black's Law Dictionary defines the verb "to publish" as "to make public; to circulate; to make known to people in general". This definition generally comports with lay dictionary definitions of that term. Webster's Seventh New Collegiate Dictionary, for example, defines "publish" as "to make generally known; to place before the public: disseminate." Thus, a person who circulates, hands out, or distributes political advertising would appear to be a "publisher" of such material, according to the dictionary. This interpretation would seem to most nearly

effect the claimed purpose of the statute in facilitating the discovery of the source of particular offensive political material and would require printing the name of the distributor of political advertising. On the other hand, the manner in which the term "published political advertising" is used in the statute suggests that the words printer and publisher are synonymous. The legislature may have meant the term "publisher" to refer to the person who prints political advertising which appears in newspapers, magazines and journals, as opposed to leaflets, hand bills, bill boards, t-shirts and the like which are printed by "printers" instead of "publishers".

A third definition of the term "publisher" is suggested by the realities of modern day political campaigns. For the most part, political advertising is designed, coordinated, circulated and distributed under the direction of professional advertising agencies. Within the trade, it is the advertising agency which "publishes" the political advertising, because it is the advertising agency which produces the material and supervises its release.

Thus, at least three different kinds of persons involved in the dissemination of political advertising could be reasonably deemed to be the "publisher" thereof. The legislature could be referring to the person physically circulating the material, the person printing it in a magazine, newspaper or journal, or the person responsible for the preparation of the ad, the advertising agency. The precise meaning of the term "publisher" is not ascertainable and, accordingly, the statute fails to set forth its requirements with requisite specificity.

Thus, it is apparent why the Three-Judge found Article 14.10(b) so vague as to be "almost impossible" to comply with.

The statutory vagueness of Article 14.10(b) is all the more repugnant because the statute clearly operates in

areas touching upon First Amendment rights. In this regard, the case of *U.S. Servicemen's Fund* v. *Eastland, supra,* is instructive. In that case the Federal Election Campaign Act had placed the media in the uncomfortable position of having to determine whether particular advertising was "on behalf of" or in denigration of any candidate for federal office. The problem (or more correctly, one of many problems) was that the statute offered no guidance for determining whether certain ads were "on behalf of" a particular candidate. In holding the law unconstitutional on vagueness grounds, the Court well stated the standard which controls the Texas law:

> "Having not only been placed in the unenviable position of enforcers of this statute, which is aimed at regulating politicians and not the media, but also faced with criminal sanctions for any questionable performance of this duty, the press is entitled to, and the constitution demands, proper guidance, free from ambiguity and vagueness."

Slip op. at p. 19. As enforcers of Texas policy, under threat of criminal sanction, the Appellees are similarly entitled to specific guidance, but Article 14.10(b) fatally fails to define its requirements with requisite specificity.

The Massachusetts Supreme Judicial Court recently reviewed and voided for unconstitutional vagueness proposed legislation in that state placing certain requirements on publishers of political advertisements. The Court stressed the need for precision in legislation regarding political advertising and ruled:

> "It would appear that the provisions above referred to would produce an unnecessarily chilling effect on the publication of any political advertising absent greater precision in definition and reasonable limitation of the phrases and provisions mentioned. To be avoided is the chilling effect of uncertain regulation on First Amendment rights."

Opinion of the Justices, Mass., June 29, 1972, 41 L.W. 2020.

The same admonition is apposite here. The dictates of Article 14.10(b), a statute undeniably regulating the exercise of First Amendment rights, are incapable of comprehension and fatally lacking in explicit direction. Men of common intelligence must be necessarily guess at its meaning and may reasonably differ as to its application. The statute is therefore void on its face, as the Three-Judge Court correctly concluded.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Appellees respectfully urge this Honorable Court to in all things affirm the judgment of the Three-Judge District Court pronouncing Article 14.10(b) of the Texas Election Code to be void on its face for its incompatibility with the mandates of the Constitution of the United States.

Respectfully submitted,

Gerald M. Birnberg

James T. Evans
5959 West Loop South
Suite 606
Bellaire, Texas 77001
(713) 664-7782

Michael Anthony Maness
1955 Richmond
Houston, Texas 77006
(713) 529-3134

Attorneys for Appellees

CERTIFICATE OF SERVICE

I, Gerald M. Birnberg, as Counsel for Appellees herein; hereby certify that true and correct copies of the foregoing Appellees Motion to Affirm have been served upon opposing counsel by placement in the United States mails, postage prepaid on this the ..... day of ....., 1974.

Ms. Elizabeth Levatino
Asst. Attorney General
Capitol Station
Austin, Texas 78711

Mr. Joe Moss
Asst. District Attorney
301 San Jacinto
Houston, Texas 77002

Mr. David Crump
Attorney at Law
2290 Two Shell Plaza
Houston, Texas 77002

Mrs. Mary Joe Carroll
Attorney at Law
P. O. Box 1148
Austin, Texas 78767

Mr. Leon Hirsch
Attorney at Law
711 Fannin
Suite 777
Houston, Texas 77002

.....
Gerald M. Birnberg

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

NO. 74-456

* * *

JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, MARK WHITE, SECRETARY OF STATE OF THE STATE OF TEXAS, AND CAROL VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS

Appellants

V.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, AND CHARLES DRAKE, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Appellees

* * *

On Appeal From The
United States District Court For The
Southern District of Texas

* * *

BRIEF OF APPELLANTS

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

ELIZABETH B. LEVATINO
First Special Assistant
Attorney General

P. O. BOX 12548
Austin, Texas 78711

February, 1975

TABLE OF CONTENTS

TABLE OF AUTHORITIES. iii

OPINION BELOW 2

JURISDICTION. 2

STATUTE INVOLVED 2

QUESTIONS PRESENTED FOR REVIEW 4

I. WHETHER OR NOT THE STATE, VESTED WITH THE RESPONSIBILITY OF REGULATING THE ELECTION PROCESS IN THE INTEREST OF THE GENERAL PUBLIC, HAD A LEGITIMATE AND SUBSTANTIAL INTEREST IN ADOPTING LEGISLATION PROVIDING FOR LIMITED DISCLOSURE IN THE ELECTION PROCESS. 4

II. WHETHER OR NOT A TEXAS ELECTION CODE REQUIREMENT THAT IDENTIFICATION OF A COMMERCIAL PUBLISHER OR PRINTER OF POLITICAL CAMPAIGN MATERIAL BE PLACED ON SUCH MATERIAL IS A SUBSTANTIAL INFRINGEMENT OF ANY FIRST AMENDMENT RIGHT. 4

III. WHETHER OR NOT ARTICLE 14.10(b), TEXAS ELECTION CODE IS UNCONSTITUTIONALLY VAGUE 4

STATEMENT OF THE CASE 5

ARGUMENT 7

I. WHETHER OR NOT THE STATE, VESTED WITH THE RESPONSIBILITY OF REGULATING THE ELECTION PROCESS IN THE INTEREST OF THE GENERAL PUBLIC, HAD A LEGITIMATE AND SUBSTANTIAL INTEREST IN ADOPTING LEGISLATION PROVIDING FOR LIMITED DISCLOSURE IN THE ELECTION PROCESS 7

II. WHETHER OR NOT A TEXAS ELECTION CODE REQUIREMENT THAT IDENTIFICATION OF A COMMERCIAL PUBLISHER OR PRINTER OF POLITICAL CAMPAIGN MATERIAL BE PLACED ON SUCH MATERIAL IS A SUBSTANTIAL INFRINGEMENT OF ANY FIRST AMENDMENT RIGHT 7

III. WHETHER OR NOT ARTICLE 14.10(b), TEXAS ELECTION CODE IS UNCONSTITUTIONALLY VAGUE 16

CONCLUSION 21

CERTIFICATE OF SERVICE. 23

TABLE OF AUTHORITIES

CASES: Page

Arnett v. Kenedy, ____ U.S. ____, 94 S. Ct. 1633 (1974). 20

Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973) 20

Connally v. General Construction Co., 269 U.S. 385, 391 (1925) 19

Lewis Publishing Co. v. Morgan, 299 U.S. 288 (1913) 13

People v. Duryea, 351 N.Y.S. 2d 978 (N. Y. Sup. 1974) 12, 13, 14

Talley v. California, 362 U.S. 60 (1960) 8, 12, 14

United States v. Harriss, 347 U.S. 612 (1954) 13, 14, 20

United States v. Insco, 356 F. Supp. 1308 (M. D. Fla. 1973) 496 F.2d 204 (5th Cir. 1974) 11, 13, 14

United States v. Scott, 195 F. Supp. 440 (D. N.D. 1961) 10, 13, 14

United States v. Vuitch, 402 U.S. 62 (1971) 20

STATUTES:

18 United States Code 612. . . . . 9, 13

28 United States Code 1253 2

28 United States Code 1343 2

28 United States Code 2101(b) 2

28 United States Code 2281. 2

28 United States Code 2284. 2

42 United States Code 1983. 2

Texas Election Code, Article 1.03 5

Texas Election Code, Article 14.10 . . . . passim

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

NO. 74-456

* * *

JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, MARK WHITE, SECRETARY OF STATE OF THE STATE OF TEXAS, AND CAROL VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS,
Appellants

V.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, AND CHARLES DRAKE, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,
Appellees

* * *

On Appeal From the
United States District Court For The
Southern District of Texas

* * *

BRIEF OF APPELLANTS

This is an appeal from a judgment of a three-judge United States District Court sitting in the Southern District of Texas entered on August 20, 1974, holding unconstitutional a portion of the Texas Election Code.

OPINION BELOW

The opinion of the court below is reported at 382 F. Supp. 801 and is reprinted in the Appendix to the Jurisdictional Statement. (A.J.S.)

JURISDICTION

This suit was brought under 42 U.S.C., Sec. 1983, and 28 U.S.C., Sec. 1343. Jurisdiction of the three-judge district court was invoked under 28 U.S.C., Sections 2281 and 2284. Notice of appeal from the judgment of August 20, 1974, was given on August 23, 1974 (A.J.S. 62)

This court has jurisdiction by direct appeal under 28 U.S.C., Sections 1253 and 2101(b), and the appeal was timely docketed.

STATUTE INVOLVED

In 1973 the Texas Legislature amended Subsection (b), Article 14.10 of the Texas Election Code (Acts 1973, 63rd Leg., Ch. 423, p. 1101, The Campaign Reporting and Disclosure Act of 1973) so that it, as amended now reads:

"Art. 14.10 Political advertising

"(b) No political advertising shall

be accepted for printing, publication, or broadcasting unless a copy of the matter to be printed or published, signed by the individual contracting therefor and showing his full address and, if he is acting as an agent, showing also the name of the candidate, political committee, or business entity he represents, is deposited with printer, publisher, or broadcaster accepting the advertising shall preserve the signed copy for a period of one year after the date of the election to which the advertising relates, and shall permit any interested individual to inspect the signed copy at any time during business hours, but only after the advertising has been printed, published, or broadcast. Such advertising shall be labeled as political advertising in the advertisement as printed, published or broadcast. Any printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person paying for the advertising.

"Any individual, firm, or corporation who violates the provisions of this Section shall be guilty of a felony and upon conviction shall be fined not less than $100 nor more than $5,000 or be imprisoned not less

than one year nor more than five years or be both so fined and imprisoned."

All of Article 14.10, Texas Election Code is reprinted at pages 65 through 68 of the Appendix to the Jurisdictional Statement.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OR NOT THE STATE, VESTED WITH THE RESPONSIBILITY OF REGULATING THE ELECTION PROCESS IN THE INTEREST OF THE GENERAL PUBLIC, HAD A LEGITIMATE AND SUBSTANTIAL INTEREST IN ADOPTING LEGISLATION PROVIDING FOR LIMITED DISCLOSURE IN THE ELECTION PROCESS.

II. WHETHER OR NOT A TEXAS ELECTION CODE REQUIREMENT THAT IDENTIFICATION OF A COMMERCIAL PUBLISHER OR PRINTER OF POLITICAL CAMPAIGN MATERIAL BE PLACED ON SUCH MATERIAL IS A SUBSTANTIAL INFRINGEMENT OF ANY FIRST AMENDMENT RIGHT.

III. WHETHER OR NOT ARTICLE 14.10(b), TEXAS ELECTION CODE IS UNCONSTITUTIONALLY VAGUE.

STATEMENT OF THE CASE

Since Article 14.10 of the Texas Election Code was first adopted in 1951 (Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 246) the statutes of Texas have required that political advertising be identified as such and since 1967 reveal at least either the name of the person paying for or printing it. As the result of political scandals, both locally in Texas and upon the national scene, the Texas Legislature adopted the Campaign Reporting and Disclosure Act of 1973 which tightened up the election provision governing campaign expenditures in several respects, only one of which was the amendment of Article 14.10 to require that both the name of the person paying for political advertising and the printer or publisher be shown.

The amendment to Article 14.10 was effective June 14, 1973. This suit was filed on September 11, 1973, at a time when there were no major elections pending in the state. It is not alleged that any effort has been made to enforce the amended provisions of Article 14.10(b) against any of the Appellees or any other member of the printing industry. Despite assertions by Appellees of "uncontradicted testimony" and of evidence under oath (see for example Appellees Motion to Affirm, pp. 3, 7, and 10) and similar statements in the opinion of the court below (A.J.S., pp. 29 and 38), the fact of the matter is that no evidence was heard by the court. Thus, there is no evidence of how the Act would be interpreted and enforced by Mark White, Secretary of State of the State of Texas, one of the Appellants, and charged by statute (Article 1.03, Texas Election

Code) with the responsibility for the enforcement and uniform application of the Texas election laws. There is no evidence in the record of how any particular printer might react or how the printing industry as a whole would react to the statute. There is no evidence that the statute, if enforced, would have a "chilling" effect upon First Amendment rights; no evidence that anyone has refused printing that has been tendered by an unpopular cause; nor any identification of the unpopular causes who will embarrass Appellees.

Nevertheless, the District Court rendered a forty-page opinion finding inter alia that Appellees " have demonstrated under oath the legitimate, bona fide fear of intimidation, harassment, and reprisal, both economic and physical, if they are required to print their names on all political advertising." (382 F. Supp. at 810 to 811).

The three-judge court entered its order holding that so much of Article 14.10(b) of the Election Code which reads:

> "Any printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person paying for the advertising"

was unconstitutional and it enjoined the State from enforcing those provisions. (A.J.S., pg. 60.)

On October 11, 1974, this Court entered its order staying judgment of the district court pending

the timely docketing of an appeal and the final disposition thereof. (A.J.S., pg. 69.)

ARGUMENT

I. WHETHER OR NOT THE STATE, VESTED WITH THE RESPONSIBILITY OF REGULATING THE ELECTION PROCESS IN THE INTEREST OF THE GENERAL PUBLIC, HAD A LEGITIMATE AND SUBSTANTIAL INTEREST IN ADOPTING LEGISLATION PROVIDING FOR LIMITED DISCLOSURE IN THE ELECTION PROCESS.

II. WHETHER OR NOT A TEXAS ELECTION CODE REQUIREMENT THAT IDENTIFICATION OF A COMMERCIAL PUBLISHER OR PRINTER OF POLITICAL CAMPAIGN MATERIAL BE PLACED ON SUCH MATERIAL IS A SUBSTANTIAL INFRINGEMENT OF ANY FIRST AMENDMENT RIGHT.

Surely the rights conferred by the First Amendment are not unlimited. No one, not even a printer, can stand in a crowded theatre and yell "Fire!" The rights conferred by the amendment carry with them certain responsibilities. Traditionally, these have been enforced by laws of libel and slander and others of like kind. Assuming for the moment that the statute in question actually involves infringement on Appellees' First Amend-

ment guarantees, surely it is not enough to show the possibility that a state law may at some future time unreasonably infringe upon First Amendment rights to have the law declared unconstitutional.

In his dissent in Talley v. California, 362 U.S. 60 (1960), Mr. Justice Clark, joined by Mr. Justice Frankfurter and Mr. Justice Whittaker, said:

> "Therefore, before passing upon the validity of the ordinance, I would weigh the interests of the public in its enforcement against the claimed right of Talley. The record is barren of any claim, much less proof, that he will suffer any injury whatever by identifying the handbill with his name. Unlike National Asso. for Advancement of Colored People v. Alabama, . . ., which is relied upon, there is neither allegation nor proof that Talley or any group sponsoring him would suffer 'economic reprisal, loss of employment, threat of physical coercion (or) other manifestations of public hostility' . . . Talley makes no showing whatever to support his contention that a restraint upon his freedom of speech will result from the enforcement of the ordinance. The existence of such a restraint is necessary before we can strike the ordinance

> down." (362 U.S. at 69).[1]

The record in this case is subject to the same criticism. Appellees had the burden of proving that enforcement of Article 14.10(b) of the Texas Election Code would unreasonably infringe upon rights guaranteed to them by the First Amendment. They made no effort at all to offer such proof. The record contains no testimony and no evidence. Appellants submit that whether or not the questioned statute had a chilling effect upon First Amendment rights or whether it unreasonably restrained them was a question of fact upon which Appellees had the burden of producing relevant evidence.

In the Jurisdictional Statement, at pages 23 to 25, we have noted some thirty-five other states having similar statutory provisions. We also cited to the Court section 612 of Title 18 of the United States Code, as amended August 12, 1970, Public Law 91-375, 84 Stat. 777, which provides in part:

> "Whoever willfully publishes or distributes or causes to be published or distributed . . . any card, pamphlet, circular, poster, dodger, advertisement, writing, or other statement relating to or concerning any

---

[1] Similarly, during the course of a recent argument before this Court (John L. Hill v. Stone, No. 73-1723, October Term, 1973), Mr. Justice White commented, critically, on the complete absence of evidence as to the manner in which the particular state statute involved was administered.

person who has publicly declared his intention to seek the office of President, or Vice President of the United States, or Senator or Representative in, or Delegate or Resident Commissioner to Congress . . . which does not contain the names of the persons, associations, committees, or corporations responsible for the publication or distribution of the same, and the names of the officers of each such association, committee, or corporation, shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Although that statute has been challenged on the same grounds that Appellees now challenge Article 14.10(b) of the Texas Election Code, it has never been held to violate the First Amendment.

In United States v. Scott, 195 F. Supp. 440 (D. N.D. 1961), involving an indictment alleging violation of that statute, the Court said:

> "Trial courts are well advised to weigh the circumstances and appraise the substantiality of the reasons advanced in support of the enactment of legislation when its constitutionality is under attack.
>
> "The Congress determined that in certain specified instances the writers of pamphlets must disclose their identity. And why was this done? So that the electorate would be informed and make its own appraisal of the reason or reasons why a particular candidate was being supported or opposed by an individual or groups. Is there anything sinister in requiring disclosure of identity to the end that voters may use their ballots intelligently? Is it not perfectly apparent what havoc could be wrought by anonymous publications concerning candidates enumerated under Sec. 612?
>
> "The Defendant's theory of fear of reprisal is highly speculative and conjectural, and it may be added, any citizen of the country could urge the same argument in like circumstances and compel the courts to attempt to forecast the danger of reprisal. The mere possibility of reprisal is not enough.
>
> "There may always be men who might think in terms of reprisal, but there will always be courts to protect the intimidated from the intimidators." (195 F. Supp. at 443.)

In United States v. Insco, 365 F. Supp. 1308 (M.D. Fla. 1973) reversed on other grounds, United States v. Insco, 496 F.2d 204 (5th Cir. 1974), con-

tentions that 18 U.S.C. 612 was unconstitutional under the doctrine of Talley v. California, supra, were likewise rejected.

Section 457 of the election law of the State of New York requires on printing for political purposes the printing of the name and post office address of the printer and of the person or committee at whose instance or request the printing was done. In People v. Duryea, 351 N.Y.S. 2d 978 (N.Y. Sup. 1974), the validity of this statute was attacked on two grounds, one that it violated the First Amendment and two, that it was overly broad. In a very scholarly and well-reasoned opinion, in which the cases which Appellees now cite were discussed, Justice Roberts concluded that, while the statute was overly broad, it did not violate the First Amendment guarantees. In passing the Court said:

> "Perhaps the statute strictly limited to the activities of campaign organizations would survive First Amendment scrutiny, justified by the same interests that spawned the contribution and expenditure laws, if it did not otherwise infringe on First Amendment rights . . . " (351 N. Y.S. 2d at 993.)

Article 14.10(b) of the Texas Election laws is limited to campaign publications. If the Court is to hold that it is unconstitutional as violating First Amendment guarantees, the Court will in effect throw out the statutes of two-thirds of the states of the Union as well as of the United States

itself.

Appellees at page 22 of their Motion to Affirm asked the Court to distinguish section 612 of Title 18 on the ground apparently, that the offices with which it is concerned are more important than the offices encompassed by Article 14.10(b). Aside from the fact that Article 14.10(b) applies to all political campaigns, and thus would encompass those encompassed by section 612, and that in fact many "lesser" elections may have equal if not greater impact on the voter, the reasoning is highly fallacious.

Consideration of Article 14.10(b) should properly be made in line with United States v. Scott, supra; United States v. Insco, supra; People v. Duryea, supra; as well as the long-standing cases of Lewis Publishing Co. v. Morgan, 299 U.S. 288 (1913) and United States v. Harriss, 347 U.S. 612 (1954). These cases involve disclosure requirements directly related to an essential governmental responsibility and interest which were upheld. Appellees attempt to distinguish the direct identification requirement of the press in Lewis Publishing Co. v. Morgan, on the grounds that it involved the power of Congress to control the mails and required such disclosure only of persons "desirous of availing themselves of the benefits of lower mail costs." (Motion to Affirm, pg. 19.) However, this view of Lewis emphasizes its similarity to the case at bar. This case involves the powers of a state to control the election process and requires disclosure only of persons desirous of availing themselves of the economic benefits de-

rived from printing campaign material.

Likewise, Appellees' attempt to disregard United States v. Harriss must fall. The " limiting construction of the term 'lobbying' " urged by Appellees to avoid First Amendment questions, in fact was undertaken by this Court to avoid a finding of unconstitutionality on the grounds of vagueness. Moreover, this Court in speaking of the First Amendment questions, recognized the realities of the situation to which Congress had responded, and correctly found that the Federal Lobbying Act did not seek to prohibit lobbying, merely asked for a "modicum of information" and in so doing used its power "in a manner restricted to its appropriate end." 347 U.S. at 625, 626. So, too, the Texas Legislature has not sought to prohibit printing of campaign material or even to prohibit anonymous printing of political positions or philosophies, but has only asked for a "modicum of information" from that group of people doing a certain type of printing from which they derive an economic benefit. This, too, represents a valid use of the power and responsibility of the state to regulate elections in a manner restricted to that appropriate end.

Therefore, as evidenced in Scott, Insco, and Duryea, the questions presented in cases such as this one have not been precluded by Talley v. California, supra. The Los Angeles ordinance considered in Talley had no relation to a well-defined area of state responsibility reflected in a statutory scheme designed to meet that responsibility. Talley is equally not controlling in this case because there the ordinance was struck down primarily on the

grounds of overbreadth, an issue not present here.

Appellants believe that the foregoing discussion alone demonstrates and supports the conclusion that Article 14.10(b) is a constitutional exercise of state authority which has not been shown to infringe on constitutional freedom. However, as set out in our Jurisdictional Statement at pages 10 through 17, Appellants also believe that the printers and publishers do not have an absolute right to publish anonymously and that the speech and associational right Appellees attempt to clothe with constitutional stature is beyond the penumbra of First Amendment protection. Without repeating what this Court has before it and considered already in our Jurisdictional Statement, the fact is that Appellees are asking this Court to extend the protection of the Constitution to speech which consists of a name only and expresses nothing of political or social importance, and to an association which is no more than an economic relationship without any purpose of the promotion or expression of ideas or positions by Appellees. Appellees are in essence asking this Court to invalidate a state scheme for regulation of the election process solely to enable Appellees to engage in a certain profitable enterprise--printing campaign material--in a manner they prefer.

When the Court considers the circumstances which spawned the 1973 amendments to Texas Election Code, the absence of any showing that this particular statute will be or has been construed and enforced to cause the slightest chill on First Amendment rights, and the actual nature of the

rights sought to be protected, Appellants submit that this Court should conclude that no violation of the United States Constitution has been shown or exists and reverse the court below.

III. WHETHER OR NOT ARTICLE 14.10(b), TEXAS ELECTION CODE IS UNCONSTITUTIONALLY VAGUE.

A second and independent ground upon which the district court based its decision to enjoin the enforcement of Article 14.10(b) is the provision's requirement that the name and address of "the person paying for the advertising" is so vague as to render it constitutionally deficient. The district court readily accepted plaintiffs' argument that the meaning of the phrase is so indefinite as to render printers and publishers incapable of determining whose name is to be placed on the advertisement, thereby subjecting them to criminal liability. But in reaching this conclusion, the district court ignored the legislative scheme in which it is found in order to create uncertainty where there is none. For when the phrase is read in context, its meaning is readily apparent.

Printers and publishers apparently had no difficulty in understanding to whom the phrase referred and complying with the requirement for six years. As previously set out, from 1967 to 1973 the printers were given the option of printing their own name or that of the person paying for the political advertising. Since they so strenuously object to identifying themselves, and there is no record

of a printer being prosecuted under Article 14.10(b), compliance with the statute was achieved by doing precisely what the printers now say they cannot do because they do not know who the person paying for the political advertising is. The previous absence of confusion or misunderstanding of this phrase is explained by an examination of the phrase in context. Subsections (a) and (b) of Article 14.10 are as follows:

> "(a) Anything published in a newspaper, magazine or journal or any pamphlet, handbill, or other printed matter, or anything broadcast over a radio or television station or displayed on a billboard, in favor of or in opposition to any candidate for any public office or office of a political party, or in favor of or in opposition to the success of any public officer, or in favor of or in opposition to any political party, or in favor of or in opposition to any proposition submitted to a vote of the people, in consideration of the receipt or promise of money or other thing of value, shall for the purposes of this section be considered as political advertising. All advertisements of marked ballots, advising or suggesting how voters should mark their ballots, shall be included in the meaning of political advertising.
>
> "(b) No political advertising shall

be accepted for printing, publication, or broadcasting unless a copy of the matter to be printed or published, signed by the individual contracting therefor and showing his full address and, if he is acting as an agent, showing also the name of the candidate, political committee, or business entity he represents, is deposited with printer, publisher, or broadcaster accepting the advertising. The person accepting the advertising shall preserve the signed copy for a period of one year after the date of the election to which the advertising relates, and shall permit any interested individual to inspect the signed copy at any time during business hours, but only after the advertising has been printed, published, or broadcast. Such advertising shall be labeled as political advertising in the advertisement as printed, published or broadcast. Any printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person paying for the advertising.

"Any individual, firm, or corporation who violates the provisions of this Section shall be guilty of a felony and upon conviction shall be fined not less than $100 nor more than $3,000

or be imprisoned not less than one year nor more than five years or be both so fined and imprisoned."

The requirement that the printer be given the identity of the person contracting for the printing and, if he is an agent, the entity he represents, existed prior to the 1973 amendment to the subsection. The resulting disclosure of either name appearing on the political advertising clearly complied with the requirement and was consistent with the statute's purpose.

Even without this six year history of compliance, the phrase in question could be constitutionally sustained under the vagueness tests established by this Court. The leading statement of the vagueness doctrine is contained in Connally v. General Construction Co., 269 U.S. 385, 391 (1925):

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

In resolving vagueness questions, however, the Supreme Court has recognized that there are limitations in the English language with respect to being both specific and manageably brief and accordingly has held that when a statute is set out in terms which the ordinary person exercising ordinary common sense can sufficiently understand and

comply with it will be upheld. Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973). See also Arnett v. Kenedy, ____ U.S. ____, 94 S.Ct. 1633 (1974) and United States v. Vuitch, 402 U.S. 62 (1971). Thus a statute does not have to satisfy the objections of all those intent upon finding fault with it at any cost. As long as the prohibition or requirement of a statute is reasonably understandable, it will be upheld.

When subjected to the foregoing standards, the phrase "person paying for the advertising" passes constitutional muster. If taken literally, the phrase clearly refers to the person or entity ultimately responsible for finding an advertisement, a fact possibly unknown to the printer. But, as stated above, taken in the context of Subsection (b), that hypothetical situation does not arise.[2] The printer will always have the name of the person contracting for the political advertising and, if he is an agent, the name of the candidate, political committee, or business entity he represents.

Again this claim of vagueness is analogous to the one asserted in United States v. Harriss, supra, wherein Chief Justice Warren speaking for the majority stated:

---

[2] In fact it is doubtful that a printer or publisher would ever be prosecuted for a violation of the statute so long as the name of someone reasonably related to the purchase of the advertisement is printed on its face. See Tex. Penal Code, Articles 8.02 and 8.03.

" . . . if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague even though marginal cases could be put where doubts might arise. United States v. Petrillo, 332 U.S. 1, 7, 67 S.Ct. 1538, 1541. Cf. Jordan v. DeGeorge, 341 U.S. 223, 231, 71 S. Ct. 703, 707, 95 L.Ed. 886. And if this general class of offenses can be made constitutionally definite, by a reasonable construction of the statute, this Court is under a duty to give the statute that construction." 347 U.S. at 618.

CONCLUSION

For the reason stated, it is respectfully submitted that the judgment of the court below be reversed.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

ELIZABETH B. LEVATINO
First Special Assistant
Attorney General

ATTORNEYS FOR APPELLANTS

P. O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Elizabeth B. Levatino, First Special Assistant Attorney General of Texas, as of counsel for Appellants herein, hereby certify that true and correct copies of the above foregoing Brief of Appellants have been served upon opposing counsel by placing copies in the mail, prepaid, to Mr. Gerald M. Birnberg, Attorney at Law, 2020 Southwest Freeway, Suite 302, Houston, Texas 77006, Counsel for Plaintiffs-Respondents; Mr. David Crump, Attorney at Law, 7018 Timber Lane, Houston, Texas 77027, Counsel for Common Cause Amicus Curiae; Mr. Joe S. Moss, Assistant District Attorney, 301 San Jacinto, Houston, Texas 77002, counsel for Defendant-Petitioner Carol S. Vance; and Mr. Leon Hirsch, Attorney at Law, 777 Houston First Savings Building, Houston, Texas 77002, counsel for Amicus Curiae Houston Chapter of the American Civil Liberties Union.

Witness my hand this ____ day of February, 1975.

_____
ELIZABETH B. LEVATINO

Supreme Court, U. S.
FILED
MAR 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1974

No. 74-456

HON. JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, HON. MARK WHITE, SECRETARY OF STATE OF THE STATE OF TEXAS, and HON. CAROL S. VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS,

Appellants,

VS.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY FITCH AND CHARLES DRAKE, Individually, and on behalf of all persons similarly situated,

Appellees

ON APPEAL FROM A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

BRIEF OF APPELLEE

GERALD M. BIRNBERG
JAMES T. EVANS
MICHAEL ANTHONY MANESS
5959 West Loop South
Suite 606
Bellaire, Texas 77401
(713) 664-7782

LIST OF AUTHORITIES

Cases

PAGE

ACLU v. Jennings, Three-Judge Court, D.C., 1973, 366 F.Supp. 1041, [Prob. Juris. noted sub. nom. Staats v. A.C.L.U., 1974, 94 S.Ct. 3066] 31

Andersen v. Martin, Three-Judge Court, M.D.Ala., 1962, 206 F.Supp. 700, Rev'd., 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed. 2d 430 ..... 23, 24

Bates v. City of Little Rock, 1960, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 ..... 11, 14, 15, 18, 28

Branzburg v. Hayes, 1972, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d. 626 ..... 12, 33, 34

Burrough & Canon v. United States, 1934, 290 U.S. 534 .... 29, 30

Bursey v. United States, 2 Cir., 1972, 466 F.2d 1085 29

California Bankers Association v. Shultz, 1974, ... U.S. ....., 94 S.Ct. 1494 ..... 33, 34, 35

Collins v. Commonwealth, 1914, 234 U.S. 634 40

Commonwealth v. Acquaviva, 187 Pa. Super. 550, 145 A.2d 407 (1958) 36

Commonwealth v. Evans, 156 Pa. Super. 321, 40 A.2d 137 (1945) 36

DeGregory v. United States, 383 U.S. 825, 86 S.Ct. 1148, 16 L.Ed.2d 292 15

DeJonge v. Oregon, 1937, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 25

Gibson v. Florida, Legislative Committee, 1962, 372 U.S. 539 15

Ginzburg v. United States, 1966, 383 U.S. 463 17

Ex Parte Harrison, 212 Mo. 88, 110 S.W. 109 (1905) 36, 37

Ex Parte Hawthorne 116 Fla. 608, 156 So. 619 (1934) 36

Hiett v. United States, 5 Cir., 1969, 415 F.2d 664 21

Irish Northern Aid Committee v. Attorney General, 1972, 409 U.S. 1080, 93 S.Ct. 679, 34 L.Ed.2d 669 15

Jamison v. State of Texas, 1946, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869 10

Lamont v. Postmaster General, 1965, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 ..... 14, 15

Lewis v. Baxley, Three-Judge Court, M.Ala., 1973, 368 F.Supp. 768 ..... 25, 27

	PAGE
Lewis Publishing Co. v. Morgan, 1913, 229 U.S. 288	29
Louisiana ex. rel Gremillion v. N.A.A.C.P., Three-Judge Court, E.D.La., 1961, 181 F.Supp. 37, aff'd., 366 U.S. 293, 81 S.Ct. 1336	15
Lovell v. City of Griffin, 1938, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949	10, 11
Martin v. City of Struthers, 1947, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313	10, 18
Meyer v. Nebraska, 1922, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042	18
Miami Herald Publishing Co. v. Tornillo, 1974, ... U.S. ....., 94 S.Ct. 2831	2, 26
Mills v. State of Alabama, 1966, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484	27
N.A.A.C.P. v. Alabama, 1958, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488	2, 11, 14, 16, 18, 23, 28, 30, 31, 33, 35, 36
New York v. Duryea, N.Y. Sup. Ct., 1974, 351 N.Y.S.2d 987	10, 37
New York Times v. Sullivan, 376 U.S. 254, 1964	17, 20
New York Times Co. v. United States, 1972, 403 U.S. 713	20
Opinion of the Justices, Mass., June 29, 1972, 41 L.W. 2020	10, 37, 42
People v. Mishkin, 17 A.D.2d 243, 234 N.Y.S.2d 342 (1st Dept. 1962) aff'd. without opinion, 15 N.Y.2d 671, 255 N.Y.S.2d 881, 204 N.E.2d 209 (1964)	28, 37
Pittsburgh Press Co. v. The Pittsburgh Commission on Human Rights, 1973, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669	17
Pollard v. Roberts, Three-Judge Court, E.D.Ark., 1968, 283 F.Supp. 248, aff'd., 1968, 393 U.S. 14	15, 29, 33, 36
Roe v. Wade, 1973, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147	19
Saari v. Gleason, 126 Minn. 378, 148 N.W. 293 (1914)	36
Schneider v. State of New Jersey, 1939, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155	16, 18
Shelton v. Tucker, 1960, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231	14, 15, 18, 29
Sherbert v. Verner, 1963, 374 U.S. 407, 83 S.Ct. 1790	18
Smith v. California, 1959, 361 U.S. 147	17

	PAGE
State v. Babst, 104 Ohio St. 168, 135 N.E. 525 (1922)	36
State v. Freeman 143 Kan. 315, 55 P.2d 362 (1934)	36
Talley v. California, 1960, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559	2, 6, 9, 10, 11, 12, 13, 18, 20, 31, 33, 36, 37
Thomas v. Collins, 1945, 323 U.S. 538, 65 S.Ct. 315, 89 L.Ed. 445	22, 25
United States v. Harriss, 1954, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989	29, 30, 31
United States c. Insco, M.D.Fla., 1973, 365 F.Supp. 308, Rev'd, 5 Cir., 1974, F.2d 204	32
United States v. National Committee for the Impeachment of the President, 2 Cir., 1973, 469 F.2d 1135	31
United States v. Robel, 1967, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508	19
United States v. Rumley, 1953, 345 U.S. 41, 73 S.Ct. 543, 97 L.Ed. 770	30, 31
United States v. Scott, N.D.Dak., 1961, 195 F.Supp. 440	32, 33
United States Servicemen's Fund v. Eastland, D.C. Cir., 1973, 488 F.2d 1253, cert. granted sub nom. Eastland v. U.S. Serviceman's Fund, Oct. 15, 1974, 43 L.W. 3208	15, 18, 41
Valentine v. Chrestensen, 1942, 316 U.S. 52	17
Zwickler v. Koota, 1966, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444, on remand, Three-Judge Court S.D.N.Y., 1968, 290 F.Supp. 244, *vacated as moot* sub. nom. Golden v. Zwickler, 1969, 394 U.S. 1031, 89 S.Ct. 956, 22 L.Ed.2d 113	10, 12, 20, 21, 26, 30, 31

Law Review Articles

Campaign Financing, 9 Harv. J.L. 359 (1972)	12, 16
Redish, Campaign Spending Laws and the First Amendment, 46 N.Y.U.L.Rev. 900 (1971)	16, 31, 33

Books

Emerson, Toward a General Theory of the First Amendment (1966)	19
Rosenberg, Some Determinants of Political Apathy in American Democracy: Essays on Image and Realities (1964)	16

IN THE

Supreme Court of The United States

OCTOBER TERM, 1974

No. 74-456

HON. JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, HON. MARK WHITE, SECRETARY OF STATE OF THE STATE OF TEXAS, and HON. CAROL S. VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS,

Appellants,

VS.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY FITCH AND CHARLES DRAKE, Individually, and on behalf of all persons similarly situated,

Appellees

BRIEF FOR APPELLEE

To the Honorable Justices of the United States Supreme Court:

The most serious dangers to constitutional liberties come not from evil-minded rulers whose malevolent motives and tyrannical actions are all too obvious, but from beneficient, well-meaning individuals who, in their zeal to achieve socially desirable ends, allow subtle but insidious encroachments upon precious freedoms, often in a manner appearing relatively unobstrusive or insubstantial, but oblivious to the inevitable cataclysm born of the continued gradual erosion of fundamental rights. That basic principle is what this case (indeed, all cases regarding First Amendment

limitations on governmental action) is all about — the ominous threat to our Bill of Rights posed by a superficially inocuous State statute conceived by men of the highest motives, but facially incompatible with the dictates of the First Amendment.

HISTORY OF THE CASE

In 1973, the 63rd Legislature of the State of Texas enacted House Bill No. 4, amending Article 14.10(b) of the Texas Election Code to provide as follows:

> "Any printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person paying for the advertising."

The amendment became effective on June 14, 1973, and provided sanctions for its violation by fine of not less than $100 nor more than $5,000 or imprisonment not less than one year nor more than 5 years or both such fine and imprisonment.

On September 11, 1973, less than three months after the new law had become effective, and before any major elections to which it would apply, the Appellees herein filed suit in the Southern District of Texas alleging that the above quoted provision of Article 14.10(b) as amended is unconstitutional and void on its face because of its interference with the Appellees' rights to political and associational privacy and anonymity (as established by *Talley* v. *California,* 1960, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559; and *NAACP* v. *Alabama,* 1958, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488); because of its abridgment of freedom of the press (cf. *Miami Herald Publishing Co.* v. *Tornillo,* 1974 U.S. , 94 S.Ct. 2831); and because of its vagueness and imprecision. The Appellees alleged under oath and subsequently presented uncontradicted testimony to substantiate that they had reason to fear and did fear that they would suffer intimidation, harassment

and reprisals if they were required to associate themselves openly and publicly with particular political candidates or positions in the manner required by the statute, that the statute possesses an inherent and substantial danger that persons seeing the Appellees' names on political advertising would mistakedly believe that the Appellees were thereby endorsing that candidate or political position, and that the statute had an unconstitutional and irreparable "chilling effect" on the exercise of First Amendment rights. In addition, the Appellees alleged that they were unable to determine the exact requirements of the penal statute because the term "person paying for the advertising" is not defined and, therefore, the Appellees were unable to ascertain whether such term refers to advertising agencies, individual advertising agents, political committees, their chairmen, political donors, political candidates, or some other individual or entity.[1]

On September 18, 1973, a hearing was held at which Plaintiffs Marion Coleman and Charles Drake testified concerning the effects of Article 14.10(b), as amended, and the facts alleged in the Plaintiffs' Original Petition concerning intimidation, harassment and reprisals of printers when required to identify themselves openly on the face of political advertising. Plaintiff Coleman testified that she was a printer who had been engaged in political activities for a number of years and had experienced specific episodes constituting harassment and intimidation as a result of her having been publicly identified as a supporter of the Republican Party. As a result of the various incidents which she described relating to her public activities on behalf of the Republican Party in the 1960, 1964 and 1968 presidential campaigns, including one episode in which she

[1] The Plaintiffs alleged that they are also unable to determine what constitutes a "publisher" under the statute and particularly whether an advertising agency constitutes a "publisher". Apparently, the industry concept of a "publisher", the lay impression of what such term encompasses, and the dictionary definition of that word are all somewhat at odds. See Text, *infra.*

was physically assaulted and beaten, she determined to remove herself from being publicly associated or affiliated with any political candidates, although she still desired to support various political causes, including specifically the candidacy of George Bush. Specifically, because of the harassment that she had encountered when she worked in the 1968 presidential election, as well as that encountered in the 1964 election, Plaintiff Coleman testified that she had not since then publicly identified herself as the printer who had done political advertising for various candidates for national office. Accordingly, because of her desire "not to be harassed" Plaintiff Coleman had formulated a firm policy for her printing company that it would turn down any future political advertising projects solely because of the disclosure requirement of Article 14.10(b).

Plaintiff Charles E. Drake then took the witness stand and testified regarding the difficulties he had in understanding the requirements of Article 14.10(b) as amended. He also related an episode in which he had placed his name and address on a piece of political advertising in compliance with the statute and was subsequently confronted by an individual who believed the disclosure to constitute an endorsement. The State presented no live testimony and, in fact, conceded that "we have no problems in terms of factual disputes", thereby stipulating the factual allegations contained in the Plaintiffs' Original Complaint. (Argument of Ms. Brown, Attorney for Defendants John Hill and Mark White at hearing held on the 20th of February, 1974, at p. 43 of Transcript).

On February 20, 1974, oral arguments were heard by the Three-Judge District Court (Judges Gee, Bue and Singleton) convened pursuant to 28 U.S.C.A. §§2281 and 2284. Multitudinous and voluminous briefs and post-submission memoranda were filed by Appellants, Appellees and Amici Curiae, and on August 20, 1974, the Three-Judge District Court rendered a 40-page opinion agreeing with the

Appellees' constitutional claims on all points and unanimously declaring the amendment to Article 14.10(b) to be unconstitutional in each respect urged by the Appellees. An Order embodying that opinion, declaring the statute unconstitutional and enjoining its enforcement was also rendered on August 20, 1974.

The Court below considered the arguments in depth and concluded:

> "The first amendment rights to freedom of speech and press exist not only because the authors of the Bill of Rights wished to humor the eccentricities of the man on the soap box but because they wished to secure forever the *means* of making the United States a free market place of ideas. The human voice and the human pen are vital to this goal but no more vital than the physical printing press itself and the persons who operate it." Court's Opinion at p. 3.
>
> • • • •
>
> "It is important to realize this when treating the instant case because in our zeal to secure individual first amendment rights it often becomes hard to see that the ideal of free men governed by free men is just as dependent upon the vehicle of free speech — a free press. Not just the freedom to write one's own tract, print it in one's basement, and distribute it on the street corner is at stake but the freedom to go to a printer in the business of printing what comes over the counter, pay him, and have printed one's tract is at stake. The purpose of the first amendment was to protect the person who only operates the press as much as the author-printer not so much because otherwise the printer might lose money but because without the printer many an author could not disseminate his ideas." Court's Opinion at p. 8.

SUMMARY OF THE ARGUMENT

Historically, anonymous pamphlets, leaflets, brochures and books have played an important role in the progress of mankind and especially the founding of our democracy.

Accordingly, it has long been recognized that exposure of the names of printers, writers and distributors of political material would tend to restrict freedom to distribute information and would lessen the circulation of literature critical to the government. Therefore, the First Amendment freedom of the press encompasses the freedom to distribute non-slanderous and non-libelous political material anonymously. *Talley* v. *California*, 1960, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559.

Additionally, the First and Fourteenth Amendments protect rights to associate together to advocate and promote legitimate, albeit controversial, political, social or economic goals. Compelled disclosure of affiliation with such groups engaged in advocacy constitutes an effective restraint on freedom of association, since inviolability of privacy in group association may in many circumstances be indispensible to preservation of freedom of association, particularly where a group espouses dissident beliefs. Indeed, forcing a man to disclose his identity may have such a powerfully deterrent effect upon the exercise of associational rights as to render them meaningless. Therefore, this Court has long protected individuals against disclosure of their political affiliations.

Article 14.10(b) of the Texas Election Code infringes upon both of these constitutional rights. It absolutely prohibits anonymous political material on any campaign or candidate related issue and it necessarily requires that printers disclose their affiliation with or support of particular political positions or candidates.

Each of the State interests allegedly furthered by the printer disclosure requirements of Article 14.10(b) can be achieved in a manner less devastating of the printers' First Amendment rights than the requirement of widespread public dissemination of their identities on each piece of political advertising, required by the present law. For example, a coded bug system, similar to that used to identify

union printing, could very easily be adopted and would be much less encroaching on fundamental rights. Secondly, a central repository system whereby printers submitted copies of each piece of political advertising printed by them would satisfy all of the objectives of the statute without widespread public identification of printers' political associations. Further, Texas could could undertake to prohibit the dissemination of falsely attributed campaign materials, which the State has not yet undertaken to do. At all events, each of the State interests asserted by the Appellants have been previously considered by this Court in the context of First Amendment infringements, and each has been found to be insufficient to justify such devastating encroachments on fundamental liberties as is effected by Article 14.10(b).

Finally, recent decisions from this Court clearly indicate that the disclosure requirements of Article 14.10(b) far transgress constitutionally permissible perameters of legitimate State action.

In addition to the statute's incompatability with the dictates of the Bill of Rights, it is so vague and imprecise as to be, as the District Court concluded, "almost impossible" to comply with. The statute does not explain who is "the person paying for the advertising" and this phrase could refer to the advertising agency paying the candidate's bills, the campaign organization represented by the ad agency, the person making a political donation earmarked for political advertising, the individual signing the check, the messenger boy delivering it, the candidate on whose behalf the advertising payment is made or several other possibilities. Indeed, not even the State of Texas and the Amicus Curiae supporting its position (which drafted the legislation) can agree upon the meaning of the term "the person paying for the advertising," and since Article 14.10(b) carries felony penalties, the printers must not be left to the guessing game which it demands.

Similarly, the term "publisher" is not defined by either statute or state law and could refer to either the printer, the person physically circulating the material, or the person responsible for the preparation of the material, depending upon which of various definitions the statute contemplates. Indeed, each of the interests conjured up in support of the statute suggests a different conclusion to the definitional quandry.

Having been placed in the unenviable position of enforcers of the statute, the printers are entitled to and the Constitution demands proper guidance, free from ambiquity and vagueness.

Article 14.10(b) is therefore void on its face, as the Three-Judge Court correctly concluded.

ARGUMENT AND AUTHORITY

I.

ARTICLE 14.10(b) OF THE TEXAS ELECTION CODE UNCONSTITUTIONALLY INFRINGES UPON APPELLEES' RIGHTS TO POLITICAL AND ASSOCIATIONAL PRIVACY AND ANONYMITY, GUARANTEED TO THEM BY THE FIRST, NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At least two distinct rights are involved in this case — freedom to print political material anonymously (encompossed in freedom of the press and freedom of speech) and the right to associate privately (included within the right to assemble).

The Right to Print Anonymously

That there exists a constitutional right to print political material anonymously cannot be seriously contested, particularly when due consideration is given to historical perspective. It is obvious why the Founding Fathers intended

associational and political privacy to be so zealously preserved — had the publisher of Thomas Paine's *Common Sense* been required to print his name and address on that political leaflet, or had Alexander Hamilton been prohibited from distributing his political writings without disclosing the name of the person printing his anonymous publications, those important documents may never have existed. Indeed,

> "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of the printers, writers and distribuotrs would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Liburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictious names." *Talley* v. *California,* 1960, 362 U.S. 60, 64-65, 80 S.Ct. 536, 538-39, 4 L.Ed.2d 559.

Thus, of historical necessity, freedom of the press encompasses freedom to print anonymously. Any other

reading of the First Amendment is to betray the lessons of history at a cost of inviting tyranny. Accordingly, any statutory enactment which requires the source of political material to be publicly revealed is automatically suspect.

That this constitutional guarantee is as vital today as it was 200 hundred years ago is made unequivocally clear by Mr. Justic Black's opinion for the Court in *Talley* v. *California, supra.* In that case, the Court reviewed and declared "facially unconstitutional" a Los Angeles municipal ordinance which required that handbills have printed on them, among other things, the name and address of the person who printed, wrote, compiled or manufactured the leaflet. "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression," Justice Black wrote. "[E]xposure of the names of printers, writers and distributors would lessen the circulation of literature critical to the government." *Talley, supra,* 362 U.S. at 64, 80 S.Ct. at 538. See also *Zwickler* v. *Koota,* 1966, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444, on remand, Three-Judge District Court, S.D.N.Y., 1968, 290 F.Supp. 244, *vacated as moot* sub. nom. *Golden* v. *Zwickler,* 1969, 394 U.S. 1031, 89 S.Ct. 956, 22 L.Ed.2d 113; *Opinion of the Justices,* Mass., June 29, 1972, 41 L.W. 2020; *New York* v. *Duryea,* N.Y. S.Ct., 1974, 351 N.Y.S.2d 978.

The *Tally* decision marked the merger of two previous lines of cases. The first of these, typified by *Lovell* v. *City of Griffin,* 1938, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; *Schneider* v. *State of New Jersey,* 1939, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; *Jamison* v. *State of Texas,* 1946, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869; and *Martin* v. *City of Struthers,* 1947, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1913; consisted of cases in which the Supreme Court had considered and consistently invalidated state and municipal regulations restricting freedom to publish, distribute and disseminate leaflets, pamphlets and handbills. The thrust

of all these cases was to the effect that the First Amendment protected such activities against virtually all encroachments by state and local law.[2]

The second line of cases assimilated in *Talley* involved Supreme Court invalidation of state action requiring disclosure of membership in particular organizations or associations. In a series of decisions highlighted by *NAACP* v. *Alabama,* 1958, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488; and *Bates* v. *City of Little Rock,* 1960, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed. 480;[3] the Court had refused to allow the states to require a political association's membership lists to be disclosed. The rationale of this line of cases was that compelled disclosure of affiliation with groups engaged in advocacy would constitute an effective restraint on freedom of association because identification and fear of reprisal would undoubtedly discourage many persons from participating in political activities, thereby "chilling" the exercise of First Amendment rights.

Stressing the historical importance of anonymous publications and the present day realities of reprisals against advocates of unpopular political positions, *Talley* merged these two lines of cases to establish the principal that, since handbill distribution could not be discouraged (*Lovell, supra, et al.*) and since identification and disclosure discourages distribution because of the fear of reprisal (*NAACP* v. *Alabama, supra, et al.*), an ordinance requiring identification of the printer and distributor of handbills was anathema to the First Amendment. As has been suggested by at least one commentator, the *Talley* opinion "can be summed up as holding that the peculiar importance of preserving handbill distribution from any deterrent

---

[2] Only ordinances regulating the time, place or manner of distribution in a way necessitated by considerations of public health or safety are permissible, and then only to the extent that such regulations do not unreasonably interfere with the exercise of First Amendment rights.

[3] See also cases cited in text, *infra.*

whatever, coupled with the frequency with which handbills proclaim unpopular views and invite reprisal, *automatically renders invalid* any law that requires the sponsors of a handbill to identify themselves."[4]

Talley was followed by *Zwickler* v. *Koota,* Three-Judge Court, S.D.N.Y., 1968, 290 F.Supp. 244. In *Zwickler,* the defendant had been arrested for distributing anonymous handbills criticizing a particular candidate for Congress. Thereafter, Zwickler challenged his arrest on grounds that the New York statute in question was unconstitutional because of its prohibition against anonymous campaign literature concerning a political candidate and he sought declaratory relief to that effect. Initially, the District Court dismissed the complaint on grounds that a federal court could not issue equitable relief (declaratory or injunctive) against the enforcement of a state penal statute. The Supreme Court reversed this holding and remanded the case for consideration of Zwickler's constitutional claims on their merits. *Zwickler* v. *Koota,* 1966, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444. Thereafter the Three-Judge Court considered the New York statute in depth on the merits and concluded that the identification requirements of the statute rendered it plainly unconstitutional. The Court relied heavily on *Talley* in reaching its decision and concluded that a statute which bars anonymity in the printing and distribution of political material is "void on its face". See also *Branzburg* v. *Hayes,* 1972, 408 U.S. 665,

[4] Campaign Financing, 9 Harv. J.L. 359, 406 (Emphasis added).

[5] This decision was appealed to the Supreme Court sub nom. *Golden* v. *Zickler,* 1969, 394 U.S. 1031, 89 S.Ct. 956, 22 L.Ed.2d 113. By the time the case reached the Supreme Court this second time, however, the candidate who had been the subject of Zwickler's anonymous criticism had retired from public service and it was unlikely that he would again seek public office. Accordingly, the Supreme Court refused to review the substantive constitutional issues and, instead, remanded the case with instructions that it be dismissed as moot, there being then no case or controversy to be decided. Thus, while the effect of the final judgment in *Zwickler* was that neither declaratory nor injunctive relief was ultimately granted, the only consideration of the merits of the First Amendment issues involved resulted in a pronouncement that the New York statute was invalid. The point of *Talley,* the fact that the First Amendment invalidates state statutes which prohibit anonymity in political comment was reinforced and underscored.

729-30, 92 S.Ct. 2646, 2674, 33 L.E.D.2d 626 (Stewart, J., dissenting) esp. at n.6.

Article 14.10(b) ignores these teachings and contravenes the principal that printers of political publications are constitutionally immune from being required to disclose publicly their identities. The printers have alleged and proved (at the hearing on application for temporary restraining order as well as by affidavits and admitted pleaings) that public disclosure of the names of printers of political material results in economic, physical and other reprisals against the printers by supporters of the opposing political view. Moreover, the Plaintiffs have demonstrated under oath a legitimate, bona fide fear of intimidation, harrassment and reprisal, if required to print their names on all political advertising.[6] On its face Article 14.10(b) demands that printers of political advertising abandon their rights to print anonymously if they choose to exercise their right to print such material. Plainly, such a requirement is inconsistent with the lessons of the past and incompatible with the Bill of Rights, which wisely in the light of historical perspective, guarantees the printers the right to print political matter without revealing their identity.

The Right to Associational Privacy

There is a second way in which Article 14.10(b) infringes on the Printers' constitutional rights. Not only does it deprive them of the right to print anonymously, it also

[6] The Brief of Appellants consistently stresses that the Plaintiffs below offered "no evidence" to support their allegations. Such statements blatantly misconstrue the record, though undoubtedly such misrepresentations were unintentional and merely reflected a breakdown in communications occasioned by a change of attorneys representing the Appellants. Initially, the

requires that a printer publicly disclose that he has, in whatever manner, supported a particular candidate or position. The printer cannot avoid revealing that he has assisted that particular candidate or political group in some manner — at the very least, by not refusing to undertake political advertising printing for them. By inevitably producing this result of disclosing political association, the statute contravenes the teachings of a long line of Supreme Court cases protecting individuals against disclosure of their political affiliations.[7] See *N.A.A.C.P.* v. *Alabama,*

Plaintiffs submitted uncontroverted affidavits from each of the Plaintiffs swearing as follows:

> "I have reason to fear and do fear that if the name of my printing company is printed on political advertising, persons seeing such advertising will mistakedly believe that I am personally endorsing the candidate or position espoused in the political advertising. Furthermore, if I undertake to print political advertising and print my name on such advertising, I have reason to fear and do fear that I will suffer intimidation, harassment and economic reprisals, including irreparable loss of business."

Moreover, live testimony was presented subject to cross-examination at the proceedings held on September 18, 1973, a copy of the transcript of which is included in the record on appeal. Further, subsequent to the oral argument before the Three Judge District Court, further evidence was presented by the Plaintiffs without objection from the Appellants establishing further specific incidence of repercussions from compliance with Article 14.10(b)'s disclosure provisions. In addition, stipulations of Fact were entered into between the parties, including, for example, a stipulation that:

> "That in furtherance of his official duties and responsibilities, Defendant CAROL VANCE will faithfully seek compliance with and enforce the provisions of Article 14.10(b) and will prosecute any printer or publisher who violates its requirements whenever such violations are brought to his attention."

Further, the attorney for the Appellants stipulated at oral argument that "we have no problems in terms of factual disputes," thereby admitting the factual allegations contained in the Plaintiffs' Original Complaint.

[7] The right to associational privacy runs two ways — it precludes the state from demanding membership information from the association (as in *N.A.A.C.P.* v. *Alabama* and *Bates* v. *City of Little Rock*) and it also prevents the State from requiring the individual to reveal the organization of which he is a member as in *Shelton* v. *Tucker* and *Lamont* v. *Postmaster*).

1958, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488; *Bates* v. *City of Little Rock,* 1960, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480; *Louisiana ex. rel Gremillion* v. *N.A.A.C.P.,* Three Judge, E.D.La., 1961, 181 F.Supp. 37, *aff'd.,* 366 U.S. 293, 81 S.Ct. 1336; *Gibson* v. *Florida Legislative Committee,* 1962, 372 U.S. 539; *Shelton* v. *Tucker,* 1960, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231; *Pollard* v. *Roberts,* E.D.Ark., 1968, 283 F.Supp. 248, *aff'd.,* 393 U.S. 14; *Lamont* v. *Postmaster General,* 1965, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398; *DeGregory* v. *United States,* 383 U.S. 825, 86 S.Ct. 1148, 16 L.Ed.2d 292; *United States Servicemen's Fund* v. *Eastland,* D.C.Cir., 1973, 488 F.2d 1253, cert. granted sub nom. *Eastland* v. *U.S. Servicemen's Fund,* Oct. 15, 1974, 43 L.W. 3208; *Irish Northern Aid Committee* v. *Attorney General,* 1972, 409 U.S. 1080, 93 S.Ct. 679, 34 L.Ed.2d 669 (Marshall, Douglas and Brennan dissenting from denial of certiorari).

"The rationale of these decisions is that the First and Fourteenth Amendments protect rights to associate together to advocate and promote legitimate albeit controversial, political, social or economic actions; that when the objective of the group or the group itself is unpopular at a given time or place, revelation of the identities of those who have joined themselves together or have affiliated with the group may provoke reprisals from those opposed to the group or its objectives; and that the occurrence or apprehension of such reprisals tends to discourage the exercise of the rights which the Constitution protects." *Pollard* v. *Roberts, supra,* 283 F. Supp. at 256.

Moreover, "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an]•••effective•••restraint on freedom of association•••. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations•••. Inviolability of privacy in group association may in many circumstances be indispensable to pre-

servation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP* v. *Alabama, supra.* Not only the Courts but also the commentators have generally conceded the obvious — that "forcing a man to disclose his identity may have such a powerfully deterrent effect upon the exercise of political rights as to render them meaningless." Redish, Campaign Spending Laws and the First Amendment, 46 N.Y.U.L.Rev.900,934 (1971). See also Campaign Financing, 9 Harv.J.L. 359, 405 (1972). One primary cause of political apathy is said to be the serious fear that open political involvement may tend to alienate friends, neighbors and employers. Rosenberg, Some Determinants of Political Apathy in American Democracy: Essays on Image and Realities 28, 29-30 (1964). Embarrassment, reprisal and other direct harms from public participation in political activities are evident and repressive. The fear of losing customers by appearing to support a candidate or position opposed by the customer is real and pressing to the printers, as common sense would indicate. More importantly, it is the small printer — the "little man" — who can least afford to offend his customers. Article 14.10(b) requires that he take this and other risks, however, if he chooses to exercise his constitutional right to print political material.

In doing so, Article 14.10(b) infringes rights to associational privacy. In the first place, as the evidence in this case shows, there is a substantial probability that persons seeing printers' names on political advertising will mistakedly consider the disclosure an endorsement of that candidate by the printers. Secondly, the statute requires that the printer reveal that he has been of some assistance to the candidate, whether the printer desires that fact to be publicly known or not. The choices posed by the statute are intolerable — either avoid the possibility of reprisal by refusing to undertake political advertising or abandon constitutional rights of associational privacy. The first choice produces a classic example of the "chilling effect" doctrine;

the latter results in direct abridgement of fundamental rights.

> "In the midst of the current zeal to prevent the fraudulent campaign practices that seem to have prevailed in the 1972 election year, legislatures and Courts should not lose sight of that which is most fundamental to our society. The importance of the lone dissenter cannot be overestimated. To undermine the right to speak anonymously is to jeopardize this ability to dissent."[8]

Concurring Opinion at p. 8.

Thus, as has been seen, Article 14.10(b) plainly encroaches on First Amendment rights. It ignores the

---

[8] As the Three-Judge Court correctly held, the fact that the printers are compensated for printing political advertisements is completely irrelevant here. Clearly, purely commercial speech is not protected by the First Amendment. *Valentine* v. *Chrestensen*, 1942, 316 U.S. 52; *Pittsburgh Press Co.* v. *The Pittsburgh Commission on Human Rights*, 1973, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669. Political advertising, however, by definition, is not purely commercial within the *Valentine* meaning, as was recently explained with unmistakable clarity in *Pittsburgh Press Co., supra:*

> "[S]peech is not rendered commercial by the mere fact that it relates to an advertisement. In *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), a city official of Montgomery County, Alabama, brought a libel action against four clergymen and the New York Times. The names of the clergymen had appeared in an advertisement, carried in the Times, criticizing police action directed against the members of the civil rights movement. In holding that this political advertisement was entitled to the same degree of protection as ordinary speech, the Court stated:
>
> 'That the Times was paid for publishing this advertisement is as immaterial in this connection as is the fact that newspapers and books are sold.' 376 U.S. at 266.
>
> See also *Smith* v. *California*, 361 U.S. 147 (1959); *Ginzberg* v. *United States*, 383 U.S. 363, 474 (1966).
>
> "If a newspaper's profit motive were determinative, all aspects of its operations – from the selection of news stories to the choice of editorial position – would be subject to regulation if it could be established that they were conducted with a review toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment." 413 U.S. 384-85, 93 S.Ct. 2558.

fundamental right to print anonymously (a necessary concomitant of freedom of the press) and it requires disclosure of participation in political activities in derogation of rights to political and associational privacy, necessary corollaries of the First and Ninth Amendment freedoms to assemble. Its unconstitutionality is, as the Three-Judge District Court unanimously concluded, transparent.

Consideration of State Interest

Of course, the fact that a particular statutory enactment infringes upon constitutional liberties, does not automatically render the statute invalid. On the other hand, state action infringing upon the exercise of First Amendment rights cannot be sustained unless the governmental interests asserted to support such impingement are "compelling" and the State has shown that no alternative forms of regulation would combat the abuses without infringing First Amendments rights as severely. *Shelton* v. *Tucker,* 1960, 364 U.S. 479, 487-490, 81 S.Ct. 247, 251-253, 5 L.Ed.2d 231; *Talley* v. *California,* 362 U.S. 60, 64, 80 S.Ct. 536, 538, 4 L.Ed.2d 559; *Schneider* v. *State of New Jersey,* 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155; *Martin* v. *Struthers,* 319 U.S. 141, 144-149, 63 S.Ct. 862, 863-866, 87 L.Ed. 1313; *Sherbert* v. *Verner,* 1963, 374 U.S. 407, 83 S.Ct. 1790. See also *United States Servicemen's Fund et al.* v. *Eastland, supra; NAACP* v. *Alabama,* 357 U.S. 449, 463-464, 78 S.Ct. 1163, 1172, 2 L.Ed.2d 1488; *Bates* v. *City of Little Rock,* 361 U.S. 516, 80 S.Ct. 412.

It is not sufficient that the state have a legitimate purpose thought to be achieved by the challenged enactment, for "a desirable end cannot be promoted by prohibited means." *Meyer* v. *Nebraska,* 1922, 262 U.S. 390, 401, 43 S.Ct. 625, 628, 67 L.Ed. 1042, 1046. "When legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have 'less drastic'

impact on the continued vitality of First Amendment freedoms." *United States* v. *Robel,* 1967, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508.

Several state interests purportedly furthered by Article 14.10(b) are urged by the Defendants as legitimizing justifications for Article 14.10(b)'s undeniable encroachment upon First Amendment liberties. As will be seen, however, all of these concerns have been previously considered by the Courts in the context of First Amendment cases and all of them have been held insufficient to justify curtailment of constitutional guarantees of political anonymity and associational privacy.

Initially the State and supporting Amicus contend that Article 14.10(b) furthers the salutory effect of purifying the electoral process by providing a means of identifying persons responsible for fraudulent, deceitful, libelous, obnoxious or falsely attributed statements in a political campaign.[9] Interestingly, the State of Texas has not made any of these activities criminal by any statutory enactment other than Article 14.10(b),[10] and that statute allows such conduct so long as the printer and the person paying for the advertising identify themselves. This absence of affirmative penal sanctions for the conduct allegedly exposed by Article 14.10(b) strongly suggests that the State's interest in this type of activity is neither as overwhelming nor as "compelling" as the Defendants and Amicus Curiae might suggest. Cf. *Roe* v. *Wade,* 1973, 410 U.S. 113, 157, n.54, 93

---

[9] Professor Emerson argues that, in general, "purification" efforts conflict with First Amendment rights and are hence invalid. See T. Emerson, Toward a General Theory of the First Amendment 103-105 (1966).

[10] The Texas Legislature is presently considering enactments which would make it unlawful to disseminate a political advertisement which is designed to convey the impression that it emanates from a source other than its true source, if the person charged had prior knowledge of that fact at the time the offense was committed. The proposed bill is presently pending before a House Subcommittee.

S.Ct. 705, 729, 35 L.Ed.2d 147 (fact that Texas has no other penal statutes protecting the life of a fetus rendered state's asserted interest in protecting prenatal life suspect).

Assuming, however, that the State of Texas possesses a legitimate desire to ferret out this kind of activity (an assumption rebutted by the dearth of other legislative activity prohibiting such conduct), *Talley* v. *California* considered precisely that state justification for a printer disclosure requirement and found it insufficient to overcome the printers' First Amendment rights to anonymity. In that case the state had argued that the ordinance was aimed at the prevention of "fraud, deceit, false advertising, negligent use of words, obscenity and libel," all of which were summarized by Mr. Justice Harlan as being "of an obnoxious character." The Court invalidated the statute nonetheless, and Article 14.10(b) suffers the same infirmity as the Los Angeles Ordinance struck down in *Talley* — neither statute is limited in its broad prohibitions to these obnoxious activities. Both enactments require printer identification on *all political advertising*, not merely that which is false, fraudulent, misleading or falsely attributed.[11]

The *Tally*-born rejection of identifying sources of obnoxious campaign material as a justification for infringement of First Amendments rights was underscored by the Three-Judge Court in *Zwickler, supra:*

[11] Admittedly, Article 14.10 is somewhat limited by its application only to "political advertising", while the *Talley* ordinance encompassed all handbills, whether dealing with political matters, religious matters, commercial matters or otherwise. On the other hand, the *Talley* ordinance applied only to handbills, while Article 14.10(b) covers all types of political advertising, including billboards, handbills, books, campaign buttons, t-shirts and all other forms of printed campaign paraphernalia. Moreover, to the extent that certain types of speech are protected more avidly than others by the First Amendment, certainly *political* discussion deserves the broadest immunity from governmental intrusion of all kinds of speech. *New York Times* v. *Sullivan*, 1964, 376 U.S. 254; *New York Times Co.* v. *United States*, 1972, 403 U.S. 713.

> "It is true — if one were to follow Defendant's reasoning — that if every colporteur were constrained by statute to disclose whose money it was that paid the printer of the tract he hawks, the information thus extruded might in some instances blaze a trail to a criminal source or misuse of funds. A constitutional right of those privileged to speak with anonymity unbreached, however, may not be disregarded to facilitate the prosecution of others who by their offending may have forfeited that right.
>
> The current attitude of the Courts is to place the emphasis on the protection and preservation of the freedom of the many to advocate conduct or to reprehend misconduct in public affairs, not to redress the wrongs, real or fancied, of the individual office holder or aspirant for what is uttered concerning his past or prospective management of those affairs." *Zwickler* v. *Koota, supra,* 290 F.Supp. at 253-54.

Similarly, in *Hiett* v. *United States,* 5 Cir., 1969, 415 F.2d 664, the Fifth Circuit considered and invalidated, on First Amendment grounds, a Federal statute which prohibited the use of the mails to distribute material concerning the availability of foreign divorces. Judicial approval of the statute was urged on grounds that it was designed to prevent divorce frauds and other illicit conduct. Nonetheless, the Court held that "the possibility of fraud in the procurement of divorces, however, does not justify a statute that makes all mailing of foreign divorce information for business purposes a potential crime." 415 F.2d at 673. Thus, the interest of the State in preventing fraud in matters crucial to the public interest is not sufficient to overcome First Amendment rights, where that objective may be achieved by less drastic means.

The conclusion that the interest asserted by the state is insufficient to allow derogation of the printers' First Amendment rights is bolstered substantially by the fact that there are alternate means available to the state for effecting this very purpose without damaging the Plain-

tiffs' constitutional rights so devastatingly. For example, a law prohibiting the dissemination of falsely attributed campaign material would effectively serve that state interest without requiring the printers to surrender rights to print anonymously. Similarly, a requirement that the printers supply a copy of all political advertising to a central depository where the identity of the printer would be available to interested persons would at least substantially minimize the deleterious effects inherent in the present law of widespread public dissemination of the printer's identity. Although such a scheme would encroach somewhat on the printers' rights of anonymity, it would materially reduce the substantial danger inherent in the present law that persons seeing Plaintiff's names on political advertising of particular candidates will mistakedly consider such association an endorsement of that candidate by the Plaintiffs. Thus, this scheme would less drastically interfere with the Plaintiffs First Amendment rights, though some intrusion would be present nonetheless.

Thirdly, the state could provide for a coded number "bug" system similar to that presently used to identify union printers. In this system, each printer who undertook political advertising would be assigned a number and that number would appear on all political advertising printed by him. Any interested person could readily ascertain the name and address of the printer assigned that number. Again, the effect of such a scheme would be to minimize the likelihood of reprisal or public misconception fostered by the present law.[12]

[12] Amicus Curiae objects to the coded number "bug" system as constituting a prior registration scheme unconstitutional under *Thomas* v. *Collins*, 323 U.S. 60 (1945). The remedy to the prior registration difficulties raised by Amicus would be simply to give the printer an option of obtaining a coded number or printing his name and address on the political advertising. Clearly such an alternative would accomplish all of the objectives conjured up in support of Article 14.10(b) in a manner much less devastating of basic constitutional freedoms.

Unless the state can persuasively demonstrate that these less restrictive means would not adequately further the interests asserted, Article 14.10(b) must be declared unconstitutional.

A second justification posed in support of Article 14.10(b) is that it allows the voters to be informed about who is supporting particular political candidates or positions.

As Amicus phrases it, the statute allows the voting public to discover what companies are being paid by whom to print advertising for candidates and political committees. Assuming for the moment that the voters have a right to know the name of the person paying for the political advertising, there is absolutely no reason why the public needs to be informed about the name and address of the printer, unless the public is supposed to infer that the printer supports that particular candidate or position. Here the state is in a hopeless dilemma. Either the statute suggests that the printer supports the candidate (in which case rights of associational privacy are clearly violated and the *NAACP* line of cases controls) or the requirement of printer identification does not provide the voters with any useful information (in which case this justification for the statute fails).[13]

At all events, the "informed voter" justification for allowing encroachment on First Amendment rights has been specifically considered and rejected by the Supreme Court. In *Andersen* v. *Martin*, Three-Judge Court, M.D.Ala., 1962, 206 F.Supp. 700, the Plaintiffs had challenged a Louisiana statute which required the race of a political candidate to be printed on the ballot. The District Court had upheld the law (despite the vigorous dissent of

[13] The printers have specifically not objected to the requirement that the name of the person paying for the advertising be printed thereon, except to the extent that such phrase is ambiguous and manifestly in need of clarification as to its precise requirements.

Judge Wisdom) on the grounds that the state could legitimately assist the voters in obtaining information about political candidates. The Supreme Court summarily reversed, declaring the statute clearly unconstitutional. The "informed voter" rationale was plainly insufficient to justify the infringement of First Amendment rights. *Andersen* v. *Martin,* 1962, 375 U.S. 399, S.Ct. 454, 11 L.Ed.2d 430.

The *Andersen* result was manifestly correct. Importantly, however, the statute ruled unconstitutional there presented more substantial justifications than Article 14.10(b). In the first place, the disclosure required by the Alabama statute related directly to the candidate, not to his supporters or persons who merely did printing for him. Presumedly the interests of a candidate in anonymity and political privacy are far less substantial than those of a person only tangentially involved in the campaign. Secondly, the information sought was certainly more relevant to the voters than the name and address of a printer. Sadly, but unescapably, the race of a political candidate may well be a significant factor in a particular voter's choice in an election. Moreover, the race of a candidate may have some relevance to his effectiveness in a particular public office in view of community sentiments or other circumstances. At all events, the voters have an absolute right to reject a candidate for any reason they chose, including deplorable, racist reasons, and it would be a sham to subgest that voters in Alabama did not consider the race of a candidate an important electoral factor. Thus, the statute declared unconstitutional in *Anderson* served the "informed voter" function much more substantially than the printer identification requirement of Article 14.10(b). *Andersen,* however, teaches that such a justification is insufficient when encroachment on First Amendment freedoms is the price.

Indeed, the *Andersen* case demonstrates dramatically why intrusions on First Amendment liberties cannot be tolerated,

even in the name of informing the electorate. If the state can violate First Amendment rights to inform the voters of who is printing political advertising, there is no reason why the state cannot infringe on First Amendment rights to inform the voters of any fact or factor which may have some bearing on their electoral decision. The Pandora's box which this approach opens is terrifying. If the state can require disclosure of information about a candidate's printer in informing the public, why not information about the candidate's race, religion, or family? Who decides what is "necessary"? If the public can be informed by the state about political candidates, why not about Judges or businessmen? A requirement, for example, that all Jewish businessmen wear yellow armbands so as to inform the public of who they are doing business with would be permissible under this approach. Admittedly the argument is hyperbolic, but the extreme follows directly and inexorably from the reasoning of the Appellants.

In *Thomas* v. *Collins,* 1944, 323 U.S. 538, 65 S.Ct. 315, 89 L.Ed. 445, the "informed public" argument was again considered and rejected. In that case the State had required public speakers to register in advance and disclose certain basic information about themselves. The justification proferred by the State was that this modicum of information would assist the public in evaluating the speaker's comments by enlightening them of their background. The Supreme Court invalidated the ordinance, on First Amendment grounds, however, despite its service to the "informed public" function. See also, *DeJonge* v. *Oregon,* 1937, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278.

The same result was reached most recently in *Lewis* v. *Baxley,* Three-Judge Court, M.Ala., 1973, 368 F.Supp. 768. In that case the Court invalidated a state statute requiring newsmen to disclose their interest in pending legislation. The State argued that this law provided information to the public on the newsmen's interests, so that the news reported could be properly evaluated by considering the bias of its

source. The "informed public" function was undoubtedly served by the statute, but it was struck down nonetheless because the disclosures required violated First Amendment rights.

A third justification offered in support of the present statute is that it assists political candidates in replying to campaign accusations. Again, this justification has been considered and rejected by judical authority. The argument was raised and swiftly rejected in *Koota, supra:* "Government assistance to a public figure, however, in ferreting out a 'producer' whom he may the more easily identify and from whom he may secure damages as balm for his individual loss at criticism of his official performance weighs in the balance as too high a price to be exacted for First Amendment freedom of expression for all. The freedom to animadvert upon public figures and affairs primes all others." 240 F.Supp. at 252-53. While the opportunity to reply to political accusations is certainly desirable, that opportunity in no way requires widespread public dissemination of the identity of a printer. Either the "bug" system or the centralized depository system mentioned above would allow a slandered candidate the ability to trace the source of the fraudulent campaign material without the dangers inherent in widespread dissemination of the printer's identity on all political advertising. False attribution could be made a crime, precluding Segretti-type activities without infringing upon the printers' constitutional right. In sum, the opportunity to reply can be sufficiently protected without the inhibiting requirement of widespread public disclosure of the printer's name and address.

Moreover, this Court has only recently considered at length and unanimously rejected "right to reply" arguments as justification for infringements on First Amendment rights of printers. In *Miami Herald Publishing Co.* v. *Tornillo,* 1974, U.S. , 94 S.Ct. 2831, this Court resoundingly disapproved a Florida "right to reply" statute because of the

blatant unconstitutionality of requiring a newspaper printer to print that which he chose not to print.

The same result was reached in *Mills* v. *State of Alabama,* 1966, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed. 2d 484. In *Mills,* Alabama had passed a law barring newspaper editorials on election issues or candidates on election day. The state had argued that this enactment was promulgated to insure that all candidates had an opportunity to reply to any political accusations. The Supreme Court rejected this justification, however, declaring that "it is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." Obviously, there is no material difference, so far as the First Amendment is concerned, between restricting what the press may print and affirmatively requiring that the press print particular matter. In either case, the justification of affording an opportunity to reply is insufficient to overcome the dictates of the First Amendment that there be no law enforced which "abridges" freedom of the press.

The fourth justification proferred in support of the Texas Election Code provision here contested is that it deters Segretti-type and Insco-type campaign "dirty tricks." The State of Texas, however, has not directed its penal sanctions against perpetrators of such illicit campaign mischief, but rather against the printers. *Lewis* v. *Baxley,* Three-Judge Court, M.D.Ala., 1973, 368 F.Supp. 768 demonstrates the inefficacy of this approach. In that case the State of Alabama had required that newsmen file a statement of economic interest stating that they were not employed by any employer having legislation pending before the state legislature. The State had argued that the enactment had deterred surreptitious lobbying by persons purporting to be members of the press. Admitting that deterence of unlawful lobbying constituted a legitimate state interest, the Court nonetheless invalidated the Alabama statute with he following remarks:

> "A part of the requirement of a substantial nexus • • • is the requirement that the State pursue its governmental interests narrowly rather than broadly. In the context of this case, that requirement means that the State may regulate lobbying and lobbyists as such, but the State may not require disclosure from occupational groups virtually at random upon the theory that one or more members may be lobbyists. If this is the governmental interest to be protected, the State should make its attack upon lobbyists as such."

That same reasoning applies to Article 14.10(b). If the State desires to prevent or deter campaign dirty tricks it should make its attack directly upon the perpetrators. To paraphrase *Lewis*, the State may not require disclosure from occupational groups [printers] virtually at random upon the theory that one or more members may be conduits to unethical campaign activities. Such an approach sweeps too broadly, where First Amendment liberties are at stake, and narrower, less restrictive means must be adopted. Requiring all printers of political advertising to identify themselves, at the risk of reprisal and intimidation, because a few printers may be used by unethical candidates to further illegitimate purposes is a remedy far more harmful than the malady allegedly cured.[14]

Indeed, the Courts have consistently invalidated political disclosure statutes despite asserted justifications more urgent than those offered by the Defendants in support of Article 14.10(b).[15] For example, in *Bates* v. *Little Rock, supra,* the Respondent had demanded the membership lists of the

---

[14] It is interesting to note here that both Insco and Segretti were convicted for their illicit activities by conviction for violating 18 U.S.C.A. § 612, the Federal Attribution Statute. Importantly, § 612 is directed against the perpetrators of the "dirty tricks", not against the printers, and it has apparently proved to be an adequate means of achieving this end.

[15] One reason why the Courts have been so adamant in striking down disclosure statutes is that the inhibiting effects of such laws are particularly chilling on highly critical dissident expression. Obviously, many printers would not wish for their names to appear in any form or fashion on political advertising highly critical of an incumbent governmental official or otherwise extremely unpopular in the position advocated. Accordingly, a necessary result of Article 14.10(b) would be to render printers less available to dissident groups or others engaged in particularly unpopular advocacy. The more critical and unpopular the expression, the less likely that printers will undertake the advertising if they must therein identify themselves. The fewer printers available, the greater the inhibtory and chilling effects on robust public discussions of controversial issues.

NAACP in aid of its power as a municipality to tax a business within its corporate limits (and it cannot be denied that the power to tax is absolutely vital to any governmental unit). Similarly in *People* v. *Mishkin,* 17 A.D.2d 243, 234 N.Y.S.2d 342, (1st Dept., 1962), aff'd without opinion, 15 N.Y.2d 671, 255 N.Y.S.2d 881, 204 N.E.2d 209 (1964), a printer identification statute very simlar to Article 14.10(b) was found unconstitutional, despite the state's urging that the disclosure requirements greatly facilitated enforcement of the State's obscenity statutes. *Pollard* v. *Roberts, supra,* invalidated state action which had sought identification of contributors to the 1966 Republican campaign fund in Arkansas, as part of an investigation of alleged vote-buying and other election law violations. In *Shelton* v. *Tucker, supra,* the state interest asserted to support disclosure was the interest of the State in evaluating prospective teachers in the public schools. Perhaps the most serious justification to be offered (and rejected) was supplied by *Bursey* v. *United States,* 2 Cir., 1972, 466 F.2d 1085, where the government had sought the identification of various members of the Black Panther organization as part of an investigation into threats on the life of the President of the United States. The Court concluded, however, that not even that alleged justification was sufficient to allow infringment of the Panther's First Amendment rights to associational privacy, on the facts of that case.

Appellant's Cases

The Appellants' reliance on early federal cases (*Burrough & Cannon* v. *United States,* 1934, 290 U.S. 534; *Lewis Publishing Co.* v. *Morgan,* 1913, 229 U.S. 288; and *United States*

v. *Harriss,* 1954, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989) to support Article 14.10(b) is misplaced. The *Lewis Publishing Co.* case, decided in 1919, upheld an Act of Congress requiring any newspaper using the second-class mails to publish the names of its editor, publisher, owner and stockholders. The case was decided not on First Amendment grounds, but on the basis of Congress' plenary powers to control the mails. The Court simply decided that Congress' power to regulate postal service encompassed the authority to insure that organizations taking advantage of reduced rates for second-class mail came within the class of persons entitled to such cut-rate benefits. The law there challenged applied only to users of second-class mail privileges and did not require disclosure except by persons desirous of availing themselves of the benefits of lower mail costs.

The *Burroughs* case is similarly inapplicable here since the sole constitutional challenge presented in *Burroughs* concerned an alleged interference with the power of the state to appoint electors. No First Amendment issues were even considered in *Burroughs.*

With regard to *Harriss,* the significance of that case is in its *limiting* construction of the term "lobbying" as used in the Federal Lobbying Act so as to avoid widespread loss of political anonymity. The *Harriss* case must be viewed in light of the question it posed, namely whether the term "lobbying" should be broadly construed to impose registration requirements upon all persons whose activities directly or indirectly influenced the passage or defeat of any legislation, or narrowly, as the Court did, to encompass only direct communications with members of Congress. The Court chose the more restricted interpretation. The effect of *Harriss* was, therefore, to limit the authority of Congress to intrude upon First Amendment rights to political anonymity, not to expand them. See *NAACP* v. *Alabama,* supra, 78 S.Ct. at 1171; *Zwickler* v. *Koota, supra* 290 F. Supp. at 255.

This reading of *Harriss* is reinforced by the case of *United States* v. *Rumley,* 1953, 345 U.S. 41, 73 S.Ct. 543, 97 L.Ed. 770. In that case the Defendant had refused to disclose to a House Select Committee on lobbying activities the names of the persons who made bulk purchases of his books. In order to avoid the "serious constitutional questions" regarding acknowledged First Amendment interests in political anonymity,[16] the Court defined the term "lobbying" as restrictively as possible so as to exclude Rumley's activities from the scope thereof and render consideration of the constitutional argument unnecessary.[17] It is the same limiting definition process which *Harriss* represents as is evident from the Supreme Court's reliance on and interpretation of *Harriss* and *Rumley* in *N.A.A.C.P.* v. *Alabama, supra,* 357 U.S. at 461, 78 S.Ct. at 1171, citing those cases as standing for the principle that enactments threatening to abridge rights to political anonymity must be narrowly construed so as to avoid that result. See also, *Zwickler* v. *Koota, supra* 290 F.Supp. at 225. *Harris*

---

[16] "Surely it cannot be denied that giving the scope to the resolution for which the Government contends, that is, deriving from it the power to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process, raises doubts of constitutionality in view of the prohibition of the First Amendment." *Rumley, supra,* 345 U.S. at 46, 73 S.Ct. at 546, 97 L.Ed. 770.

[17] This same approach of construing disclosure statutes very narrowly limiting their applicability so severely that the serious constitutional issues need not be faced because the plaintiff is no longer within the reach of the statute is evident in two recent cases involving the Federal Election Campaign Act and the advertising disclosure aspects thereof. In *U.S.* v. *National Committe for the Impeachment of the President,* 2 Cir., 1973, 469 F.2d 1135, and *A.C.L.U.* v. *Jennings,* Three-Judge Court, D.C., 1973, 366 F.Supp. 104) (prob. juris. noted sub. nom. *Staats* v. *A.C.L.U.* 1974, 94 SCt. 3066) the Courts were asked to review and declare unconstitutional the disclosure provisions of the Act as violative of the plaintiff's First Amendment rights. Both Courts expressed grave doubts about the constitutionality of the Act but by construing the Act narrowly, decided that the plaintiffs did not come within its coverage, thereby avoiding decision on constitutional grounds.

does not, as the Defendants imply, sanction political identification enactments; it limits them.[18]

The only recent case which offers even remote support for the Defendants' position is *United States* v. *Scott,* N.D.Dak., 1961, 195 F.Supp. 440.[19] That case is neither controlling or persuasive here, however, and is clearly distinguishable. In the first place, it should be noted that *Scott* is a single Judge district court case with no appellate history. More importantly, the case involves the Federal Attribution Statute, 18 U.S.C.A. § 612. That statute is significantly different from the Texas Article 14.10(b) in at least two important respects: (1) The Federal Attribution Statute requires disclosure of the name of the persons "responsible" for the publication and the names of the officers of each association. Thus, it is directed against active participants in a high level federal election campaign whose anonymity, as a practical matter, is generally non-existent anyway. At all events, the Federal act is directed toward the perpetrators of illicit activities, not the persons incidentially involved (such as printers). (2) The Federal statute is applicable only with regard to the offices of President, Vice President, Senator, Representative or Resident Commissioner to Congress. These are, of course, the highest political offices in the land. With so much at stake, the constitutional considerations weigh differently.

Thirdly, *Scott* does not rest on a rationale applicable to the case at bar, since § 612 applies only to statements relating to or concerning a candidate for President, Vice-President, Senator, Representative or Resident Commissioner in Congress. Article 14.10(b), on the other hand, encompasses political advertising concerning all public officers and candidates and all propositions submitted to a vote of the people.

[18] To the extent, if any, that *Harriss* can be read as approving some form of disclosure provisions despite First Amendment mandates, it was, of course, severely limited by the Supreme Court's subsequent decision in *Talley, supra.* See Redish, supra, 46 N.Y.U.L.R. 900,929.

[19] *United States* v. *Insco,* M.D.Fla., 1973, 365 F.Supp. 308, on which the Appellants relied in the Court below, has now been reversed on appeal. *United States* v. *Insco,* 5 Cir., 1974, 496 F.2d 204.

Moreover, *Scott's* distinction of *Talley* is less than clear.[20] Without much explanation, the statute was upheld in *Scott* with the simple generalization that "it is a valid exercise of the legislative power in the national interest." Without suggesting what the result may have been had the statute been more closely scrutinized, it is apparent that the *Scott* Court erroneously applied the "rational basis" test rather than the "compelling state interest" test in considering the constitutional argument. Therefore, *Scott* does not provide useful precedent for considering the constitutionality of Article 14.10(b).

The Appellants have also suggested that their position is supported by the recent Supreme Court cases of *Branzburg* v. *Hayes,* 1972, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626; and *California Banker's Association* v. *Shultz,* 1974 .... U.S. ...., 94 S.Ct. 1494. With regard to *Branzburg,* however, Mr. Justice White, writing for the majority, went out of his way to emphasize that "these cases involve . . . no express or implied command that the press publish what it prefers to withhold. . . No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request." 408 U.S. at 681-82, 92 S.Ct. at 2656-57. On the contrary, Article 14.10(b) does

[20] The Court suggested that the Defendant in Scott had not made a sufficient demonstration of likelihood of reprisal. Clearly, however, it is the legitimate *fear* of reprisal, not the fact of reprisal, which imposes the "chilling" effect on the exercise of First Amendment freedoms and renders disclosure enactments unconstitutional. See, e.g., Talley, supra; NAACP v. Alabama, supra; and Pollard v. Roberts, supra:

> "While there is no evidence of record in this case that any individuals have as yet been subjected to reprisals on account of the contributions in question it would be naive not to recognize that the disclosure of the identities of contributors to campaign funds would subject some of them to potential economic or political reprisals of greater or lesser severity • • •. [T]he occurrence or *apprehension* of such reprisals tend to discourage the exercise of the rights which the Constitution protects." 283 F.Supp. at 256, 258 (Emphasis added).

See also Redish, supra, 46 N.Y.U.L.R. at 934.

require the press to publish its sources and indiscriminately disclose them to all persons who receive the printed material. Further, unlike *Branzburg,* Article 14.10(b) does not limit its disclosure provisions to a requirement that a printer disclose information only to a duly constituted Grand Jury investigating a specific criminal episode. Rather, Article 14.10(b) requires that the information solicited be publicly disseminated to all persons receiving the political material in question. In this regard, Article 14.10(b) would be analogous to a law which required every newspaper story to identify the source of the news story on the face of the article. Clearly any such requirement would be transparently unconstitutional, as *Branzburg* suggests. Yet Article 14.10(b) is a precise functional equivalent of such a manifestly invalid enactment. See also Dissenting Opinion of Mr. Justice Stewart, esp. at 408 U.S. 729-735, 92 S.Ct. 2673-2677.

With regard to the *California Banker's Association* case, that case supports the Appellees' position, not the Appellants'. That case considered the constitutionality of various provisions of the so-called Bank Secrecy Act of 1970 and the implementing regulations promulgated thereunder by the Secretary of the Treasury. Carefully distinguishing the recordkeeping provisions of Title I of the Act from the reporting requirements of Title II of the Act, the Court upheld the constitutionality of Title I because the records required to be maintained would not be generally obtainable by the public or the government and, in fact, "were to be available only by normal legal process." 94 S.Ct. at 1524. The Court stressed, however, that "neither the provisions of Title I nor the implementing regulations require that any information contained in the records be *disclosed* • • • ," and expressed doubt that the Secretary would have authority to require the reporting of any of the records required to be maintained under Title I of the Act. With regard to the ACLU argument that Title I violated First Amendment rights to associational privacy, the Court simply ruled that since no disclosure had

been sought by the Government, the Court "is simply not in a position to determine whether an effort to compel disclosure of such records would or would not be barred by such cases as *NAACP* v. *Alabama, supra.*" 94 S.Ct. at 1515. Thus, since no *disclosure* had been sought (as opposed to mere reporting), no First Amendment issue was properly before the Court.

Obviously, Article 14.10(b) does not possess the virtue which saved Title I from unconstitutionality—unlike the recordkeeping provisions of Title I, Article 14.10(b) does require disclosure. Moreover, the disclosure required by the Texas statute must be publicly disseminated on every item of political advertising undertaken by the printer. Significantly, the printers have not objected to the recordkeeping provisions of Article 14.10 and the Texas Election Code. Indeed, they have suggested a recordkeeping provision (central repository scheme) as a less restrictive alternative to the present law. What and all the printers have challenged is the *disclosure* requirements of Article 14.10(b) which call for widespread public dissemination of printers' affiliation with or support of political candidates or organizations.

With regard to the recording provisions of Title II, the Court ruled that there was no Plantiff before it who had alleged that the Act would apply to him. That is, none of the depositers asserted that they were engaged in domestic transactions involving $10,000 or more, and therefore there was no Plaintiff present in the case who alleged that he was affected by the Act's reporting requirements. Therefore, the First Amendment challenges to Title II were specifically and expressly not considered by the Court.

It is significant to note that three of the nine Supreme Court Justices (Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Douglas) dissented from the holding of the Court in the *California Bankers,* contending that the Act was unconstitutional, citing the same cases relied upon by the Appellees herein to demonstrate that the Bank Secrecy Act

was violative of rights to associational privacy. Moreover, two other Justices, Mr. Justice Powell and Mr. Justice Blackmun specially concurred in the disposition of the four judge plurality, due to the procedural posture of the case, but specifically warned that "a significant extension of the regulation's reporting requirements, however, would impose substantial and difficult constitutional questions for me. In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon intimate areas of an individual's personal affairs. Financial transactions can reveal much about a person's activities, *associations* and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy." 94 S.Ct. at 1526 (emphasis added). The clear implication of Mr. Powell's special concurrence, joined by Mr. Justice Blackmun, strongly suggests that a requirement of public disclosure of political associations and fiancial transactions (such as is obviously required by Article 14.10(b)) as opposed to a mere reporting requirement, would probably be deemed constitutionally obnoxious by these two Justices also. The special concurrence, the dissents and the reaffirmation of the validity of the constitutional principles established by *NAACP* v. *Alabama, supra* and *Pollard* v. *Roberts, supra,* contained in the plurality opinion of the Court (see 94 S.Ct. at 1514) clearly indicate that Article 14.10(b) of the Texas Election Code cannot pass constitutional muster.

With regard to the earlier State cases discussed by Amicus Curiae (*Ex parte Hawthorne,* 116 Fla. 608, 156 So. 619 (1934); *State* v. *Freeman,* 143 Kan. 315, 55 P.2d 362 (1934); *State* v. *Babst,* 104 Ohio St. 168, 135 N.E. 525 (1922); *Commonwealth* v. *Acquaviva,* 187 Pa.Super. 550, 145 A.2d 407 (1958); to which list should be added *Saari* v. *Gleason,* 126 Minn. 378, 148 N.W. 293 (1914) and *Commonwealth* v. *Evans,* 156 Pa.Super. 321, 40 A.2d 137 (1945),[21]) it is readily aparent that each of these decisions pre-dates

[21] The Missouri Court was alone in correctly prophesizing the Talley result. See Ex parte Harrison, 212 Mo. 88, 110 S.W. 109 (1905).

Talley and *NAACP* v. *Alabama* by many years. Subsequent to *Talley* each of the State Courts which have considered a political advertising disclosure requirement has found such a provision to be constitutionally infirm. See *New York* v. *Duryea, supra;* Opinion of the Justices, Mass., June 29, 1972, 41 L.W. 2020; *People* v. *Mishkin,* 17 A.D.2d 243, 234 N.Y.S.2d 342 (1st Dept., 1962) aff'd. without opinion, 15 N.Y.2d 671, 255 N.Y.S.2d 881, 204 N.E.2d 209 (1964). Cf. *Ex parte Harrison, supra.*

Finally, the State of Texas urges its "doomsday" argument. If the Court is to hold that Article 14.10(b) is unconstitutional as violating First Amendment guarantees, the State asserts, "the Court will in effect throw out the statutes of two-thirds of the states of the Union as well as of the United States itself." Appellants' Brief at p. 12-13. That assertion is flatly incorrect. Only Alaska and California join Texas in requiring that the name and address of the printer appear on the campaign material. (Unlike Texas, violations in Alaska and California constitute only a misdemeanor offense.) Oregon and Vermont require that the political advertising include the name and address of the "publisher" but no case law in either of those states establishes whether the publisher means the printer or the person preparing or the person distributing the advertising. See discussion text, *infra.* A summary of each of the state laws cited by the Appellant is set forth in Appendix A to this Brief.

Thus, none of the interests conjured up by the Defendants possess the requisite urgency to justify derogation of the Plaintiffs' First Amendment rights to print anonymously and associate privately. Indeed, alternative means are available to achieve each of the interests asserted by the state without the widespread impairment of constitutional liberties inherent in Article 14.10(b). In sum, the requirements of Article 14.10(b) are dangerously incompatible with the dictates of our Bill of Rights. Accordingly, the Three-Judge Court's declaration that the statute is unconstitutional should be affirmed.

II.

ARTICLE 14.10(b) IS VOID FOR VAGUENESS, IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The theory underlying the constitutional concept of "vagueness" is based firmly in the logical proposition that no citizen should be compelled to risk criminal sanction without reasonable notice of the behavior proscribed by law. The law must not be a game of chance that tricks reasonable men, even unintentionally.

Two overpowering clarity gaps riddle Article 14.10(b) so completely that the District Court concluded that compliance with its mandates is "almost impossible."

(1) *Who is the "person paying for the advertising"?* This phrase could reasonably encompass any of a number of individuals. For example, it could refer to the advertising agency paying the candidate's bills; or it could contemplate identification of the campaign organization represented by the ad agency; or it could mean the person making a political donation earmarked for political advertising; or it could refer to the individual signing the check, or the messenger boy delivering it, or the candidate in whose behalf the payment is really made. Confusingly, each of the several interests asserted by the state in support of the statute suggest a different answer to this perplexing question. Thus, if the legislature was seeking to prevent fraud, slander, and other obnoxious campaign material, the name of the campaign committee, organization or association from whose coffers the money ultimately came might be the appropriate party to list as the person paying for the advertising. On the other hand, if the purpose of the statute is to inform the voters of the source of a particular candidate's support, the initial contributor would be the appropriate person to identify as the person paying for the advertising. If, on the other hand, the purpose of the statute is to help the voter evaluate campaign material, the fact that the ad was designed by a particular advertising agency may be the disclosure contemplated by the statute. To the extent that the law is aimed at exposing the perpetrators of campaign dirty tricks, the individual within the campaign organization who was responsible for the particular ad would be the individual referred to by the statute (assuming that such individual was in any manner responsible for paying for the ad, which may not be the case in a large campaign using a voucher expense system). Finally, if Article 14.10(b) is meant to provide an opportunity to reply, the name of the candidate on whose behalf the ad was paid for would be the proper party to identify as "the person paying for the advertising."

Dramatically underscoring the vagueness of the statute, the Defendants in their Brief in the lower court insisted that the "person paying for the advertising" "would, a fortiori, be either the candidate, his campaign manager or assistant campaign manager, or the campaign manager of a political committee" (excluding the advertising agent or agency). Amicus Curiae supporting the Defendants, Common Cause, (which had drafted the legislation in the first place) disagreed in their Brief, insisting that "the person paying for the advertising" is the person "who has given the check that pays them" (i.e. the advertising agent, advertising agency or campaign donor). In its Application for Stay, the Petitioners suggested still another possible interpretation of the phrase:

> "It could be the person giving the money to the printers and publishers, the person, if paid by check, signing the check, the campaign manager of a campaign who under the Election Code is one of the persons entitled to authorize expenditures."

In the words of the Three-Judge District Court:

> "Article 14.10(b) which carries with it criminal penalties must be more explicit. The printers must not be left to a guessing game.
>
> The definition of 'persons paying for the advertising' should be left to the legislature for definition

> but as the statute now stands complying with it is *almost impossible* because it is 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . .'"

The honest printer who seeks only to comply with the law faces an intolerable guessing game in trying to identify "the person paying for the advertising". It is precisely this dilema which the vagueness doctrine condemns and the Constitution forbids. Clearly Article 14.10(b) does not even meet the tenuous vagueness standards of 1914 which merely required "a standard of conduct it was possible to know". *Collins* v. *Commonwealth,* 1914, 234 U.S. 634.

(2) *What is a "publisher"?* Black's Law Dictionary defines the verb "to publish" as "to make public; to circulate; to make known to people in general". This definition generally comports with lay dictionary definitions of that term. Webster's Seventh New Collegiate Dictionary, for example, defines "publish" as "to make generally known; to place before the public: disseminate." Thus, a person who circulates hands out, or distributes political advertising would appear to be a "publisher" of such material according to the dictionary. This interpretation would seem to most nearly effect the claimed purpose of the statute in facilitating the discovery of the source of particular offensive political material and would require printing the name of the distributor of political advertising. On the other hand, the manner in which the term "published political advertising" is used in the statute suggests that the words printer and publisher are synonymous. The legislature may have meant the term "publisher" to refer to the person who prints political advertising which appears in newspapers, magazines and journals, as opposed to leaflets, hand bills, billboards, t-shirts and the like which are printed by "printers" instead of "publishers".

A third definition of the term "publisher" is suggested by the realities of modern day political campaigns. For the most

part, political advertising is designed, coordinated, circulated and distributed under the direction of professional advertising agencies. Within the trade, it is the advertising agency which "publishes" the political advertising, because it is the advertising agency which produces the material and supervises its release.

Thus, at least three different kinds of persons involved in the dissemination of political advertising could be reasonably deemed to be the "publisher" thereof. The legislature could be referring to the person physically circulating the material, the person printing it in a magazine, newspaper or journal, or the person responsible for the preparation of the ad, the advertising agency. The precise meaning of the term "publisher" is not ascertainable and, accordingly, the statute fails to set forth its requirements with requisite specificity.

Thus, it is apparent why the Three-Judge found Article 14.10(b) so vague as to be "almost impossible" to comply with.

The statutory vagueness of Article 14.10(b) is all the more repugnant because the statute clearly operates in areas touching upon First Amendment rights. In this regard, the case of *U.S. Servicemen's Fund* v. *Eastland, supra,* is instructive. In that case the Federal Election Campaign Act had placed the media in the uncomfortable position of having to determine whether particular advertising was "on behalf of" or in denigration of any candidate for federal office. The problem (or more correctly, one of many problems) was that the statute offered no guidance for determining whether certain ads were "on behalf of" a particular candidate. In holding the law unconstitutional on vagueness grounds, the Court well stated the standard which controls the Texas law:

> "Having not only been placed in the unenviable position of enforcers of this statute, which is aimed at regulating politicians and not the media, but also faced with criminal sanctions for any questionable performance of this duty, the press is entitled to, and the constitution demands, proper guidance, free from ambiguity and vagueness."

Slip op. at p. 19. As enforcers of Texas policy, under threat of criminal sanction, the Appellees are similarly entitled to specific guidance, but Article 14.10(b) fatally fails to define its requirements with requisite specificity.

The Massachusetts Supreme Judicial Court recently reviewed and voided for unconstitutional vagueness proposed legislation in that state placing certain requirements on publishers of political advertisements. The Court stressed the need for precision in legislation regarding political advertising and ruled:

> "It would appear that the provisions above referred to would produce an unnecessarily chilling effect on the publication of any political advertising absent greater precision in definition and reasonable limitation of the phrases and provisions mentioned. To be avoided is the chilling effect of uncertain regulation on First Amendment rights."

Opinion of the Justices, Mass., June 29, 1972, 31 L.W. 2020.

The same admonition is apposite here. The dictates of Article 14.10(b), a statute undeniably regulating the exercise of First Amendment rights, are incapable of comprehension and fatally lacking in explicit direction. Men of common intelligence must be necessarily guess at its meaning and may reasonably differ as to its application. The statute is therefore void on its face, as the Three-Judge Court correctly concluded.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Appellees respectfully urge this Honorable Court to in all things affirm the judgment of the Three-Judge District Court pronouncing Article 14.10(b) of the Texas Election Code to be void on its face for its incompatibility with the mandates of the Constitution of the United States.

Respectfully submitted,

Gerald M. Birnberg

James T. Evans

Michael Anthony Maness

5959 West Loop South
Suite 606
Bellaire, Texas 77401
(713) 664-7782

CERTIFICATE OF SERVICE

I, Gerald M. Birnberg, as Counsel for Appellees herein, hereby certify that true and correct copies of the foregoing Appellees Brief have been served upon opposing counsel by placement in the United States mails, postage prepaid on this the .... day of March, 1975.

Ms. Elizabeth Levatino
Asst. Attorney General
Capitol Station
Austin, Texas 78711

Mr. Joe Moss
Asst. District Attorney
301 San Jacinto
Houston, Texas 77002

Mr. David Crump
Attorney at Law
2290 Two Shell Plaza
Houston, Texas 77002

Mrs. Mary Joe Carroll
Attorney at Law
P. O. Box 1148
Austin, Texas 78767

Mr. Leon Hirsch
Attorney at Law
711 Fannin
Suite 777
Houston, Texas 77002

.....
Gerald M. Birnberg

APPENDIX A

Summary of Statutes

18 U.S.C § 612 (Supp. 1974). A person commits an offense if he publishes or distributes in interstate commerce any campaign material which does not contain the name of the person or organization responsible for the material. The penalty is a fine of not more than $1000 or imprisonment of not more than one year, or both.

ALA. CODE tit. 17, § 282 (1959). Campaign material must include the name of the person publishing or distributing it. A printer can violate by printing without the required disclosure. Misdemeanor, fine of not more than $500, imprisonment for not longer than 6 months.

ALASKA STAT. § 15.55.030 (Supp. 1973). The author, printer, and publisher of campaign material must be identified by name and address. Misdemeanor, fine of not more than $500, or imprisonment of not longer than 1 year.

ARK. STAT. ANN. § 3-1104 (i) (Supp. 1973). Campaign material cannot be published, printed, or distributed unless it identifies the sponsors or payers. Misdemeanor, fine of not more than $1000, or imprisonment for not longer than 1 year, or both.

CAL. ANN. ELEC. CODE § 12047 (Supp. 1961). Relating to campaign material designed to defeat a candidate, one who writes, prints, or distributes campaign material, violates the law unless the material contains the name and address of the printer and either the offices of the organization or the individual responsible therefore. Misdemeanor.

CAL. ANN. ELEC. CODE § 12047 (Supp. 1974). Relating to campaign material designed to defeat a measure on the ballot, such material must contain the name and address of either the officers of the organization or the individual responsible therefore.

COLO. REV. STAT. § 49-23-31 (1964). A person who publishes or distributes campaign material that does not contain the name of the person responsible for publication or distribution commits an offense. Fine of not more than $1000 nor less than $100.

GA. CODE ANN. § 34-1307.1 (1970). No person shall distribute or publish campaign material without the name and address of the person distributing or publishing. Misdemeanor, fine of not more than $1000, imprisonment of not more than 12 months, or both.

ILL. ANN. STAT. ch. 46, § 29-14 (Supp. 1974). A person who publishes or distributes campaign material which does not contain the name and address of the person causing such material to be published or distributed commits an offense. Misdemeanor, fine of not more than $1000, or imprisonment of less than 1 year.

IOWA CODE ANN. § 738.22 (1950). Whoever writes, prints, or distributes campaign material commits an offense, unless the material contains the name and address of the officers of the organization or the individual responsible for it. Misdemeanor, fine of not more than $100, or imprisonment of not more than 30 days, or both.

KAN. STAT. ANN. §25-1714 (1973). Whoever writes, prints, or distributes campaign material commits an offense, unless the material contains the name of the officers or the organization or the individual responsible therefor. Imprisonment for not more than 6 months.

KY. REV. STAT. § 123.095 (1971). All material must include the name and address of the person paying for the material.

LA. REV. STAT. AN. §18:1531 (West 1969). No person shall publish or distribute campaign material unless it contains the name and address of the person responsible for publication or distribution. Fine of not less than $1000 nor more than $10,000, or imprisonment of not less than 1 year nor more than 10 years, or both.

ME. REV. STAT. ANN. tit. 21, ch. 39. § 1575 (Supp. 1974). The source of campaign material must be identified by the name of the individual or the officers of the organization that sponsors it. Fine of not more than $500, or imprisonment of not more than 90 days.

MASS. ANN. LAWS, ch. 56, § 39 (Supp. 1974). No person shall publish in a newspaper or periodical any paid political advertisement unless it contains the name of the officers of the organization or the voter responsible therefor. Fine of not more than $1000 or imprisonment for not more than 1 year.

MD. ANN. CODE, art. 33, § 26-16(a)(7) (Supp. 1973). A person who publishes or distributes campaign material commits an offense unless the name and address of the person responsible therefore is included on the material.

MICH. COMP. LAWS ANN. § 168.914a (1967). No newspaper or periodical shall permit campaign advertisement unless it states the name and address of the person or organization paying for the advertisement.

MINN. STAT. ANN. § 211.08 (Supp. 1974). A person who publishes or distributes campaign material that does not include the name and address of the author, candidate or organization distributing or publishing the material is guilty of a misdemeanor.

MISS. CODE ANN. § 23-3-37 (1972). No person shall write, print, or distribute any campaign material unless the material is submitted to and approved by the candidate and such approval is printed on the material. Misdemeanor.

MO. ANN. STAT. § 129.300 (1966). It is unlawful for a person or organization to publish or distrbuite campaign material unless the material contains the name and address of the person or organization causing the publication or distribution. Misdemeanor, fine of not less than $100 nor more than $500, or imprisonment of not more than 6 months nor less than 30 days, or both.

MONT. REV. CODES ANN. § 94-1452 (1949). No newspaper or periodical shall include political advertisement unless it indicates the names and addresses or the officers of the organization or the individual responsible therefor. Misdemeanor.

NEB. REV. STAT. § 32-1153 (1974). No person shall print, publish, or distribute campaign material without including the name of the organization or individual who requested it, ordered it, or printed it. Misdemeanor.

N.H. REV. STAT. ANN. § 70:14 (Supp. 1973). All campaign material shall be signed by the person responsible for it. Misdemeanor for individuals, felony for others.

N.J. STAT. ANN. § 19:34-38-1 (1964). No person shall print, publish, distribute, or pay for any campaign material unless it bears the name and address of the person responsible for it, paying for it, or printing it.

N.D. CENT. CODE ANN. § 16-20-17.1 (Supp. 1973). All campaign material shall disclose the name and address of its sponsors and the person paying for it. Fine of not less than $100 nor more than $500, or imprisonment for not less than 30 days nor more than 6 months, or both.

OHIO REV. CODE ANN. § 3599.09 (1972). No person shall write, print, or ditribute campaign material unless it contains the name and address of the officers of the organization or the individual responsible for it. Fine of not less than $300 nor more than $2000.

OKLA. STAT. ANN. tit. 26, § 491 (Supp. 1973). Whoever writes, prints, or distributes campaign material, unless it includes the name and address of the officers of the organization or the individual who placed the order, shall be guilty of a misdemeanor. Fine not more than $500, or imprisonment of not more than 30 days, or both.

ORE. REV. STAT. § 260.522 (1973). No person shall print, publish, or distribute any campaign material unless it includes the name and address of the publisher. Misdemeanor, fine or not more than $1000, or imprisonment of not more than 1 year.

PENN. STAT. ANN. tit. 25, § 3546 (1963). Any person who writes, prints, or distributes any campaign material commits an offense, unless it includes the name of the officers of the organization or the registered voter responsible therefor. Fine of not more than $500, or imprisonment of not more than 6 months, or both.

R.I. GEN. LAWS, § 17-23-2 (1970). No person shall write, print, or distribute any campaign material unless it contains the name and address of the officers of the organization or voter responsible therefor. Misdemeanor, fine of not less than $100 or more than $500, or imprisonment of not more than 3 months.

TENN. CODE ANN. § 2-1920 (Supp. 1974). All campaign material shall be signed by the writer or officer of the organization responsible therefor. Misdemeanor, fine of not more than $1000, or imprisonment of not more than 1 year, or both.

UTAH CODE ANN. § 20-14-24 (1969). No newspaper or periodical shall include campaign material unless it states the name of the officers of the organization or voter responsible for paying for the advertisement.

VT. STAT. ANN. tit. 17, § 2022 (1968). A person who writes, prints, publishes, or distributes campaign material, unless it includes the name and address of the author and publisher, shall be fined not more than $500.

VA. CODE ANN. § 24.1-259 (1973). When a person pays for any campaign material to be printed, the printer must report the name and address of the payer to the board of elections. Misdemeanor, fine of not more than $500, or imprisonment of not more than 12 months or both.

W. VA. CODE ANN. § 3-8-12(a) (1971). No person shall publish or distribute any anonymous campaign material.

Misdemeanor, fine of not more than $1000, imprisonment of not more than 1 year, or both.

WIS. STAT. ANN. § 12.14(1) (West 1967). No newspaper or periodical shall publish campaign material unless it includes the name of the person authorizing it and paying for it. Fine of not less than $25 or more than $1000, imprisonment in the county jail for not less than 1 month or more than 1 year, imprisonment in the penitentiary for not less than 1 year or more than 3 years, or both.

WASH. REV. CODE ANN. § 29.85.270 (1965). All campaign material must identify the sponsor of it by name and address. Misdemeanor, fine of not more than $1000, or imprisonment of not more than 1 year, or both.

Supreme Court, U. S.
FILED
APR 7 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

NO. 74-456

* * *

JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, MARK WHITE, SECRETARY OF STATE OF THE STATE OF TEXAS, AND CAROL VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS

Appellants

V.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, AND CHARLES DRAKE, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,

Appellees

* * *

On Appeal From The
United States District Court For The
Southern District of Texas

* * *

REPLY BRIEF OF APPELLANTS

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

ELIZABETH B. LEVATINO
First Special Assistant Attorney General

ATTORNEYS FOR APPELLANTS
P. O. Box 12548
Austin, Texas 78711

April, 1975

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

NO. 74-456

* * *

JOHN HILL, ATTORNEY GENERAL OF THE STATE OF TEXAS, MARK WHITE, SECRETARY OF STATE OF THE STATE OF TEXAS, AND CAROL VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS
Appellants

V.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, AND CHARLES DRAKE, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED,
Appellees

* * *

On Appeal From The United States District Court For The Southern District of Texas

* * *

REPLY BRIEF OF APPELLANTS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Although Appellants do not feel compelled to reply to the legal argument and authorities contained in Appellees' Brief since virtually all the material was previously set out in Appellees' Motion to Affirm, Appellants cannot, in good conscience permit certain factual assertions of Appellees to go unchallenged.

In the brief of Appellants we said, at page 5:

> ". . . Despite assertions by Appellees of 'uncontradicted testimony' and of evidence under oath (see for example, Appellees' Motion to Affirm, pp. 3, 7, and 10) and similar statements in the opinion of the court below (A.J.S., pp. 29 and 38), the fact of the matter is that no evidence was heard by the court. Thus, there is no evidence of how the Act would be interpreted and enforced by Mark White, Secretary of State of the State of Texas, one of the Appellants, and charged by statute (Article 1.03, Texas Election Code) with the responsibility for the enforcement and uniform application of the Texas election laws. There is no evidence in the record of how any particular printer might react or how the printing industry as a whole would react to the statute. There is no evidence that the statute, if enforced, would have a "chilling" effect upon First Amendment rights; no evidence that anyone

> has refused printing that has been tendered by an unpopular cause; nor any identification of the unpopular causes who will embarrass Appellees."

Appellees, in their brief, assert at page 13, footnote 6:

> "Such statements blatantly misconstrue the record, though undoubtedly such misrepresentations were unintentional and merely reflected a breakdown in communications occasioned by a change of attorneys representing the Appellants . . . . "

With due respect to counsel for Appellees, we cannot be as charitable. The efforts of Appellees to misconstrue the record and thus, through misrepresentations, mislead the court as to the nature of the hearing in the district court are intentional.

Rule 43 of the Federal Rules of Civil Procedure provides in part:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. . ."

Certain basic facts were established by a Stipulation (Record on Appeal, Instrument No. 15, reprinted as Appendix A to this Brief), but aside from those facts, no evidence was presented and no factual issues were before the three-judge court when it entered its orders. Thus it is easy to understand why counsel for Appellant stated to the court that "We

have no problems in terms of factual disputes." Strangely, Appellees omit the balance of that statement which was:

> "The Stipulation set forth the basic issues that are involved in the cause of action." (Page 43, Transcript, February 20, 1974)

To understand the assertions of Appellees' brief, it is necessary to briefly review the development of this case in the courts.

Suit was filed originally on September 12, 1973, and at that time a hearing was set on the application for a temporary restraining order for the following Monday, September 17. Appellants filed an answer to the original complaint and, contrary to the statement on page 13 of Appellees' brief, did not admit that public disclosure of the names of printers, would result in economic reprisals but, to the contrary, urged that Appellees should be required to prove those allegations. The hearing on the motion for temporary restraining order was held on September 18 before a single judge of the United States District Court for the Southern District of Texas, John V. Singleton, Jr., although, at that time, he had requested that a three-judge court be appointed. At that hearing there was testimony from two of the plaintiffs, Marion Coleman and Charles Drake. However, Judge Singleton refused to grant the temporary restraining order.

The case was tried on its merits seventeen months later, on February 20, 1974, before the three-judge court. No witnesses testified and the

testimony of no witness was incorporated by reference or otherwise. The matter was tried by Appellees as if they felt there were no facts to be determined and it was in this context that counsel for Appellants stated, as Appellees quote her, that "We have no problems in terms of factual dispute."

It is interesting to note, that, apparently, the court felt there were not factual issues because, contrary to the mandate of Rule 52 of the Federal Rules of Civil Procedure, the court filed no finding of fact.

Parenthetically, we would add that a reading of the testimony of Appellees' two live witnesses at the September 18, 1973 hearing on the temporary restraining order, reveals that such testimony falls far short of establishing any likelihood of a chilling effect upon First Amendment rights by the enforcement of 14.10(b) of the Texas Election Code. The principal part of the testimony of Mrs. Coleman was to the effect that long before she had become a printer, she was assaulted and harassed because of political positions she took as an active Republican worker, (Pages 7-17, Transcript of September 18, 1973 hearing).

The instance of Mr. Drake was that one of his customers objected to having Drake's name printed on the front of the card and objected to paying the additional cost of having it printed on the back. True, he also testified that an ex-employee, seeing his name on the card of a candidate, construed that as indicating he supported the candidate, but the ex-employee's emotion upon seeing the name was not

one of unhappiness but rather of surprise. (Pages 22-23, Transcript of September 18, 1973, hearing.)

There was some conjectural evidence by both these witnesses as to how other persons might possibly react but surely nothing which would rise to the level of admissible evidence to prove a fact.

A further example of the failure of Appellees' to present proof to establish facts essential to their position is found at the paragraph at the bottom of page six in Appellees' Brief. Appellees' conclusion that any number of alternative methods can be easily adopted, less encroaching on some fundamental rights and equally further the state interest involved is totally without any proof, evidence or testimony to support such a conclusion.

Thus, we reiterate our statement that there was no proof and no evidence before the court to establish facts essential to Appellees' asserted cause of action.

Respectfully submitted,

JOHN L. HILL
Attorney General Of Texas

DAVID M. KENDALL
First Assistant Attorney General

JOHN W. ODAM
Executive Assistant Attorney General

Elizabeth Levatino

ELIZABETH B. LEVATINO
Special Assistant Attorney General

ATTORNEYS FOR APPELLANTS

P. O. Box 12548
Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Elizabeth B. Levatino, First Special Assistant Attorney General of Texas, as of counsel for Appellants herein, hereby certify that true and correct copies of the above foregoing Reply Brief of Appellants have been served upon opposing counsel by placing copies in the mail, prepaid to Mr. Gerald M. Birnberg, Attorney at Law, 2020 Southwest Freeway, Suite 302, Houston, Texas 77006, Counsel for Plaintiffs-Respondents; Mr. David Crump, Attorney at Law, 7018 Timber Lane, Houston, Texas 77027, Counsel for Common Cause Amicus Curiae; Mr. Joe S. Moss, Assistant District Attorney, 301 San Jacinto, Houston, Texas 77002, counsel for Defendant-Petitioner Carol S. Vance; and Mr. Leon Hirsch, Attorney at Law, 777 Houston First Savings Building, Houston, Texas 77002, counsel for Amicus Curiae Houston Chapter of the American Civil Liberties Union.

Witness my hand this 4th day of April, 1975.

Elizabeth Levatino
ELIZABETH B. LEVATINO

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, AND CHARLES DRAKE individually, and on behalf of all persons similarly situated, Plaintiffs	*	
VS.	*	CIVIL ACTION NO. 73-H-1261
HON. JOHN HILL, Attorney General of the State of Texas, HON. MARK WHITE, Secretary of State of the State of Texas, and CAROL S. VANCE, District Attorney, Harris County, Texas, Defendants	*	

STIPULATIONS OF FACT

COME NOW the Plaintiffs and Defendants in the above styled and numbered cause by and through their counsel of record, and would agree and stipulate to each of the following facts:

1. That all Defendants have been duly served with process herein.

2. That Defendant JOHN HILL is the duly elected, qualified and acting Attorney General of the State of Texas.

3. That Defendant MARK WHITE is the duly appointed, qualified and acting Secretary of State of the State of Texas.

4. That Defendant CAROL VANCE is the duly elected, qualified and acting District Attorney for Harris County, Texas.

5. That Plaintiffs MARION COLEMAN, GRADY E. FITCH and CHARLES DRAKE are all residents of Harris County, Texas, and are all individuals all of whom are engaged in the printing industry as printers and all of whom have undertaken to print political advertising in the past and desire and intend to undertake the printing of political advertising in the future.

6. That the amount in controversy in this case well exceeds the sum of TEN THOUSAND DOLLARS ($10,000.00), exclusive of interest and costs (although money damages are not here sought).

7. That this Honorable Court has jurisdiction over this dispute by virtue of Title 28 of the United States Code, Sections 1331, 1343, 2201 and 2202 and that the convening of a Three-Judge District Court was and is appropriate by virtue of Title 28 of the United States Code, Sections 2281 and 2284.

8. That venue in the Southern District of Texas is proper under Section 1391(b) of Title 28 of the United States Code.

9. That the 63rd Legislature of the State of Texas amended Article 14.10(b) of the Texas Elec-

tion Code to provide, in pertinent part, as follows:

> "any printed or published political advertising shall also have printed on it the name and address of the printer or publisher and the person who paid for the advertising".

10. That the aforesaid amendment to Article 14.10(b) of the Texas Election Code became effective on June 14, 1973.

11. That Article 14.10 as amended provides for punishment for its violation by a fine of not less than $100.00 nor more than $5,000.00 or imprisonment not less than one year nor more than five years or both such fine and imprisonment.

12. That there are no pending criminal prosecutions for alleged violations of Article 14.10(b), as amended, to the knowledge of any of the parties hereto.

13. That in furtherance of his official duties and responsibilities, Defendant CAROL VANCE will faithfully seek compliance with and enforce the provisions of Article 14.10(b) and will prosecute any printer or publisher who violates its requirements whenever such violations are brought to his attention.

14. That, in the event that this Honorable Court should determine that Article 14.10(b) is unconstitutional, then in that event, Defendants JOHN HILL, MARK WHITE and CAROL VANCE are proper

BEST COPY AVAILABLE

parties for purposes of effecting declaratory relief.

15. That one of the purposes of Article 14.10 (b), as amended, is to provide a means of tracing the source of political advertising disseminated to the general public.

16. That Article 14.10(b), as amended, prohibits the dissemination of political advertising material which does not reveal the identity of the individuals contracting for and paying for the printing or publishing of the political advertisement.

17. That one of the objectives of Article 14.10 (b) as amended is to avoid the dissemination of so-called "smear sheets" in political campaigns and elections whereby certain information is disseminated to the general public and falsely attributed on the face thereof to a particular political candidate or spokesman, or whereby false and prejudicial information is distributed to the general public without reasonable means of rapidly identifying the perpetrator of the "smear".

18. The State of Texas has a legitimate interest in preventing the dissemination of "smear sheets" as defined above, or in minimizing the deleterious effects thereof.

19. That, if this Honorable Court should determine that Article 14.10(b), as amended is unconstitutional, but only in such event, then a judgment declaring Article 14.10(b) to be null and void would be appropriate in this case.

RESPECTFULLY SUBMITTED,

GERALD M. BIRNBERG
2020 Southwest Freeway
Suite 302
Houston, Texas 77006
529-7648
ATTORNEY FOR PLAINTIFFS

PENNY BROWN
Asst. Attorney General
M & M Bldg.
Room 369
Houston, Texas 77002
228-0701
ATTORNEY FOR DEFENDANTS
JOHN HILL AND MARK WHITE

JOE MOSS
Asst. District Attorney
Harris County Courthouse
301 San Jacinto
Houston, Texas 77002
228-8311
ATTORNEY FOR DEFENDANT
CAROL VANCE

MOTION FILED

FEB 6 1975

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

NO. 74-456

JOHN HILL, ATTORNEY GENERAL OF TEXAS, MARK WHITE, SECRETARY OF STATE OF TEXAS, AND CAROL VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS, Appellants

V.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, AND CHARLES DRAKE, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, Appellees

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

MOTION OF COMMON CAUSE FOR LEAVE TO FILE AMICUS CURIAE BRIEF

****

AMICUS CURIAE BRIEF OF COMMON CAUSE, URGING REVERSAL

DAVID CRUMP
2018 Timber Lane
Houston, Texas 77027

FRANK G. WALTERMIRE
2480 Two Shell Plaza
Houston, Texas 77002

Attorneys for Common Cause

February 1975

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

NO. 74-456

JOHN HILL, ATTORNEY GENERAL OF TEXAS, ET AL., Appellants

V.

PRINTING INDUSTRIES OF THE GULF COAST, ET AL., Appellees

MOTION OF COMMON CAUSE FOR LEAVE TO FILE AMICUS CURIAE BRIEF URGING REVERSAL

Common Cause, movant, hereby respectfully requests leave to file a brief amicus curiae urging reversal of the judgment of the district court. The interest of Common Cause is set forth in a section entitled "Interest of Amicus Curiae" in the brief annexed hereto.

All parties have consented to the filing of this brief amicus curiae by Common Cause. Common Cause participated in the district court by both briefs and oral argument.

An amicus curiae brief is desirable in this case because the statute attacked protects compelling state interests in the electoral process. It is one of many similar statutes in effect among the several states and the federal jurisdiction. Common Cause, because of its continuing interest in the election laws, may be able to aid the Court in developing the issues fully.

Respectfully submitted,

_____

David Crump
Attorney for Common Cause

TABLE OF AUTHORITIES

CASES:

American Party of Texas v. White, 39 L.Ed. 2d 744 (1974)..... 8,25

Branzburg v. Hayes, 408 U.S. 665 (1972)..... 11,12, 32

Brown v. Storer, 42 U.S.L.W. 4440 (1974)..... 8,9

Bullock v. Carter, 405 U.S. 134 (1972)..... 16

Burroughs v. U.S., 290 U.S. 534 (1933)..... 10,15

California Bankers Ass'n v. Shultz, 42 U.S.L.W. 4481 (1974)..... 13,17,23

Commonwealth v. Acquaviva, 185 Pa. Super 550, 145 A.2d 407 (1958).... 20

Ex Parte Harrison, 212 Mo. 88, 110 S.W. 109 (1905)..... 20

Ex Parte Hawthorne, 116 Fla. 608, 156 So. 619 (1934)..... 20

Gertz v. Robert Welch, Inc., 42 U.S. L.W. 5123 (1974)..... 30

Hadnott v. Amos, 394 U.S. 358 (1969)..... 16

Jeness v. Fortson, 403 U.S. 431 (1971)..... 8,16

Lewis Publishing Co. v. Morgan, 229 U.S. 228 (1913)..... 14,22

Lorain Journal Co. v. U.S., 342 U.S. 143 (1952)..... 26

Lubin v. Panish, 42 U.S.L.W. 4453 (1974)..... 8

Miami Herald Publishing Company v. Tornillo, 94 S. Ct. 2831 (1974)... 21,22

NAACP v. Alabama, 357 U.S. 449 (1958)..... 19

New York v. Duryea, 42 U.S.L.W. 2420 (N.Y.S.Ct. 1974)..... 20,21

New York Times v. Sullivan, 376 U.S. 254 (1964)..... 30

Oklahoma Press Co. v. Walling, 327 U.S. 186 (1946)..... 27

O'Shea v. Littleton, 94 S. Ct. 669 (1974)..... 23

Pittsburg Press Co. v. Pittsburg Comm. of Human Relations, 413 U.S. 376 (1974)..... 26

Powe v. Miles, 407 F. 2d 73 (4th Cir. 1968)..... 13

S.E.C. v. Wall St. Transcr. Corp., 422 F. 2d 1371 (2nd Cir. 1970).... 13

Smiley v. Holm, 285 U.S. 355 (1932). 10

State v. Babst, 104 Ohio St. 167, 135 N.E. 525 (1922)..... 20

State v. Freeman, 143 Kan. 315, 55 P. 2d 362 (1934)..... 20

Talley v. California, 362 U.S. 60 (1960)..... passim

Thomas v. Collins, 323 U.S. 516 (1945)..... 28

U.S. v. Harriss, 347 U.S. 612 (1954). 12,15,17

U.S. v. Insco, 365 F. Supp. 308 (M.D. Fla., 1973)..... 6,20,30,31

U.S. v. Scott, 195 F. Supp. 440 (M.D. Dak. 1961)..... 20

U.S. v. Segretti, ____ F. Supp. ____ (M.D. Fla. July 26, 1973).... 5

U.S. v. Vuitch, 402 U.S. 62 (1971).. 34

U.S. Civil Serv. Comm'n v. Letter Carriers, 41 U.S.L.W. 5122 (1973).. 33,34

Veterans & Reservists for Peace in Vietnam v. Comm'r, 459 F. 2d 676 (3rd. Cir. 1972)..... 13

Williams v. Rhodes, 393 U.S. 23 (1968)..... 16

Wirtz v. Fowler, 372 F. 2d 315 (5th Cir. 1966)..... 13

STATUTES:

Article 14.10(b), Texas Election Code..... passim

Article 8.03, Texas Penal Code..... 35

18 U.S.C. § 612..... 20,35,31

UNITED STATES CONSTITUTION:

First Amendment..... passim

"Republican form of government" clause..... 9

"Times, Places and Manner" clause.. 9,33

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

NO. 74-456

JOHN HILL, ATTORNEY GENERAL OF TEXAS, MARK WHITE, SECRETARY OF STATE OF TEXAS, AND CAROL VANCE, DISTRICT ATTORNEY FOR HARRIS COUNTY, TEXAS, Appellants

V.

PRINTING INDUSTRIES OF THE GULF COAST, MARION COLEMAN, GRADY E. FITCH, AND CHARLES DRAKE, INDIVIDUALLY AND ON BEHALF OF ALL PERSONS SIMILARLY SITUATED, Appellees

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

INTEREST OF AMICUS CURIAE

The Texas Campaign Reporting and Disclosure Act of 1973 puts into effect a disclosure system for election campaigns, designed to inform the public about the financing behind communications that influence votes. The Act contains requirements for public reporting of campaign contributions and expenditures. It also includes disclosure requirements for advertising aimed at influencing election votes, and it is these requirements, codified in Article 14.10(b) of the Texas Election Code, that are at issue here.

Amicus Curiae Common Cause is a nationwide citizen's lobbying organization whose main concern is the efficacy of political and electoral institutions within these United States. Common Cause helped draft the Texas Campaign Reporting and Disclosure Act and lobbied for its passage. The organization uses information provided through the Act in its regular activities. For example, Common Cause of Greater Houston, a local affiliate, has monitored spending and advertising in campaigns in Houston and has attempted to secure compliance, analyze disclosures, and pass information gained thereby to candidates and voters. The position of Common Cause is that Article 14.10(b) is essential to the purposes of the Texas Campaign Reporting and Disclosure Act and does not abridge Appellees' first amendment rights.

SUMMARY OF ARGUMENT

Article 14.10(b), the statute at issue here, serves crucial functions in securing fair elections. It allows the public to know who is behind the finances that influence votes, gives candidates an assurance of fair opportunity to reply to campaign charges, provides a first line of defense against campaign "dirty tricks," and allows rudimentary checking of financial disclosure reports. The providing of fair elections by such means as this is a fundamental duty of government and a compelling state interest. The statute, furthermore, is a disclosure law whose effects on speech are incidental and indirect. The decisions indicate that such a statute should be held constitutional.

Furthermore, Article 14.10(b) does not conflict with the decisions of this Court. Talley v. California, Appellees' case of

principal reliance, concerned a dragnet statute that required author identification on every handbill of whatever type wherever distributed. Article 14.10(b), by contrast, is limited in its coverage to an essential type of disclosure in a situation wherein the likelihood of adverse effects is at a minimum.

Article 14.10(b) will not prevent any candidate able to pay for printing from disseminating election advertising. The statute does not stop, censor, or burden speech; rather, it fits within the permissible category of reasonable "time, place and manner" regulations. It is also the least onerous alternative that will accomplish the fundamental goals at stake. The alternative "secret code,""central repository," "criminal libel," and "author-only" systems proposed by Appellees would in fact themselves be excessively onerous or unworkable.

Finally, Article 14.10(b) is not vague. The words it uses are words of common understanding and persons of ordinary intelligence can comply with it if they exercise common sense. If Appellees' complaint is that they see more than one reasonable way to comply with the statute, compliance in any reasonable way is sufficient under the decisions of this Court, and the statute is not thereby rendered vague.

I. THIS STATUTE, ARTICLE 14.10(b) SERVES FUNDAMENTAL GOVERNMENTAL INTERESTS IN SECURING FAIR ELECTIONS, AND IT SHOULD BE UPHELD UNDER THE CONTROLLING DECISIONS.

Article 14.10(b) does not simply ask disclosure for the sake of disclosure. It enacts a comprehensive plan that accompli-

shes an important state goal. Under Article 14.10(b), a person paying for election campaign advertising signs a copy of the advertising and leaves it with the printer, who retains it for one year. The signed copy must also contain a statement of the name of the candidate, committee or entity the payor represents. When the advertising is printed, it contains the name and address of the person paying as well as the name and address of the printer. The useful feature of Article 14.10(b) is that knowing the printer, any person can go the address of the printer, inspect the signed copy, and determine with some degree of certainty the source of the paid advertising. Even more importantly, if a piece of advertising is falsely attributed, the false attribution may, in most instances, be promptly exposed during the election.

A. This statute serves as Texas' first line of defense against the worst kinds of campaign "dirty tricks." It also serves many other purposes related to the preservation of democratic elections.

Article 14.10(b) allows a candidate to make fair reply to election advertising. Without this statutory requirement, there are frequently dozens of purportedly authoritative advertisements in any election campaign, making charges and claims about candidates without any indication of the persons behind the advertising or their motives. If the candidate can see from the face of the advertisement who has printed it, the Act allows that person to go to the printer, inspect the copy signed by the payor, and find out whom that person represents. Without the statute, candidates

would continue to do what they have done in the past: expend great amounts of their resources, use confidential informants, and resort to rumor to find out who is behind campaign charges, generally with little success.

A second result of this statute is that it better informs the public about the financing behind communications that influence its votes. Even more than the candidate, the voter is barraged with communications he or she is unable to evaluate quickly enough. The attribution clause requirements of Article 14.10(b), disclosing both the person paying and the printer, allows the voter some assurance that he knows the source or, alternatively, through the printer, facilitates identification of falsely attributed smears and enables the voter to evaluate them accordingly.

A third important function of Article 14.10(b) is that it is Texas' first line of defense against campaign "dirty tricks" of certain kinds. One of the worst kinds of "dirty tricks" is the falsely attributed smear, which works as follows: candidate X writes a smear of candidate Y that is outlandishly false and vicious, then distributes it under candidate Z's name. For example, hearings in the United States Senate have shown that Donald Segretti in Florida made sexual smears of Senators Humphrey and Jackson on stationery of Senator Muskie. Another of Segretti's efforts compared Governor Wallace to Hitler, adding a statement favoring massive school busing again attributed to Senator Muskie. These advertisements created a mud-slinging atmosphere in Florida's Democratic primary prior to the 1972 election, with the advertisers hoping that their rival party candidate would be aided. Article 14.10(b), had it been in effect, would have done one of two things: (1) id-

entified a printer through whom the advertising could have been traced or (2) caused the false attribution of the smears to be recognizable through the misidentification or nonidentification of the printer. Thus Article 14.10(b) decreases the feasibility and usefulness of the falsely attributed smear. Such dirty tricks have by no means been limited to the Segretti incident in Florida; every state, including Texas, has had an abundance of them.*

Besides allowing fair replies and limiting dirty tricks, the statute is related to the remainder of the Texas Campaign Reporting and Disclosure Act in significant ways. For example, it allows an approximate check of reported expenditures to be conducted. Organizations such as Common Cause will be able to trace and verify the actual advertising expenditures of candidates, which are the largest outlays in most campaigns. As a related purpose, Article 14.10 (b) provides the only tangible way in which

---

* For descriptions of other celebrated "dirty tricks", see, e.g., N. Y. Times, Jan. 25, 1974, p. 1 col. 8 (Speaker and Majority Leader of New York Assembly prosecuted for flooding 12 electoral districts with falsely attributed literature); Record, United States v. Insco, 42 U.S.L.W. 2284 (M.D.Fla. 1974)(Insco, a 1972 Republican Congressional candidate, printed and distributed bumper stickers with "McGOVERN-GUNTHER" on them, then publicly attributed their origin falsely to Democratic opponent Gunther to link Gunther to the unpopular (in Florida) Democratic presidential nominee). The State of Texas should not be required to suffer such conduct without effective legislative response.

violations of the Act can be adequately investigated. If, for example, a candidate conspires with others to represent that his campaign contributions and expenditures are less than they actually were, the thorough investigation of advertising expenditures, which are the largest portion of any campaign, may be impracticably difficult without the names and addresses of printers to identify amounts received.

A sixth purpose of this advertising disclosure requirement is that organizations and opposing candidates may be able to estimate election eve expenditures by candidates. The last report required by the Texas Act is ten days to seven days before each election. This time limit is carefully calculated to avoid undue burdens on candidates, allow public discussion before the election, and include many expenditures; but in the usual election the period that is ten days to a week before the election is the period of mot heavy expenditures and prior disclosures of finances may seriously understate them.

Seventh, a legitimate reason for the designation of the payor and printer is the same as that for the disclosure of contributions and expenditures themselves. The voting public has a right to discover what companies are being paid by whom to print advertising for candidates and political committees. Furthermore, if the candidate complies with the law, the printer's name will eventually become public record anyway, through the candidate's own financial disclosure statement when it is filed, since that statement is required to give the name and address of all persons to whom expenditures are made by the candidate.

Finally, this statute enacts a uniform simple way in which candidates can make disclosure. Many conscientious candidates will

desire to make disclosure on their advertising, and Article 14.10(b) can be expected to achieve public acceptance for the practice, making it easy for conscientious and non-conscientious candidates both.

B. The purposes served by Article 14.10(b), including those enumerated above, constitute compelling state interests.

The decisions indicate that the providing of fair elections, as this statute does, is a governmental interest of the highest order. For example, in Jeness v. Fortson, 403 U.S. 431 (1971), this Court considered the constitutionality of a Georgia statute requiring minority candidates to get signed petitions with five percent of voters' names in order to get on the ballot. Even though such a statute would freeze out some minority candidates, this Court held that the governmental interest in making ballots orderly, so that the public can make sense out of the candidacies it examines, justified the statute and made it constitutional. Article 14.10 (b) serves the same kind of interests in a more fundamental way, and its impact is far less adverse to minority candidacies.

More recently, this Court's decisions in Brown v. Storer, 42 U.S.L.W. 4440 (1974); Lubin v. Panish, 42 U.S.L.W. 4453 (1974); and American Party v. White, 42 U.S.L.W. 4453 (1974) have re-emphasized the importance of the governmental interests at stake here. Brown v. Storer,particularly, involved a California law that disallowed candidacies of persons who had been members of another party within the preceding twelve months. The law was designed to prevent confusion and deception in the form of "stalking horse" candidacies, as well as

ballot proliferation. This Court stated that the law served "an important state interest . . . in avoiding confusion, deception and even frustration of the democratic process . . . . A state has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidates." By enacting Article 14.10(b), Texas has attempted to serve the same important state interest in a way that does not prevent anyone's candidacy.

Brown v. Storer also emphasizes the passage of the Constitution that allows States to regulate the "Times, Places and Manner of holding Elections," and states that "as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democractic process." 42 U.S.L.W. at 4442 (emphasis added). The sole purpose of Article 14.10(b) is fair, honest elections. Article 14.10(b) is more closely related to that goal, indeed, than was the California law in Brown. The United States Constitution guarantees Texas a republican form of government--not an oligarchic one that can be won by excessive unattributed spending or an anarchic one in which dirty tricksters purposefully conceal from voters the pressures that influence their votes. In enacting Article 14.10(b), Texas has done nothing but attempt to safeguard the republican form of government for itself.

It is not only in recent decisions that the Court has recognized the legislature's extensive authority to enact regulations inhibiting unfair or fraudulent election practices. In characterizing this legislative authority, Chief Justice Hughes once said that it included:

". . . authority to provide a complete code for congressional elections, not only as to times and places but in relation to notices, registration, supervision and voting, protection of votes, prevention of fraud and unfair practices, counting of votes, duties of inspectors, canvasses, and publication of election returns; in short, to enact the numerous requirements to procure the safeguards which experience shows are necessary in order to protect the fundamental rights involved."

Smiley v. Holm, 285 U.S. 355, 366 (1932)(emphasis added). A year later, in Burroughs v. United States, 290 U.S. 534, 545 (1933), the Court stated as follows:

"To say that Congress is without power to pass appropriate legislation to safeguard such an election form the proper use of money to influence the result is to deny the nation in a vital particular the power of self protection. Congress undoubtedly possesses that power, as it possesses every other essential to preserve the departments and institutions of the general government from impairment whether threatened by force or corruption."

With these words, the Court upheld as constitutional the financial disclosure requirements of the Federal Corrupt Practices Act, requirements analogous to those in Article 14.10(b). Thus the decisions, past and present, indicate strongly that the statute at issue here serves a "fundamental" and "compelling" state interest in safeguarding the democratic election process.

C. Reasonable disclosure requirements such as those codified by Article 14.10(b) can and

should be used to further the compelling state interest of protecting the electoral process.

When, as here, a compelling state interest is at stake, it is appropriate for the state to use a reasonable disclosure law to accomplish its legitimate purposes. An examination of the controlling cases leaves little doubt that the assurance of fairness by the means used in Article 14.10(b) is a sufficiently strong interest to justify limited disclosure requirements. Indeed, disclosure laws have been upheld as constitutional and necessary in protecting interests that do not appear to be as fundamental as those at stake in the electoral process here.

For example, in Branzburg v. Hayes, 408 U.S. 665 (1972), three newspaper reporters were asserting a constitutional right of speech and association which they claimed protected them from compelled disclosure of confidential news sources before a grand jury. This Court, in rejecting the claim, stated its reason thus:

"As we have indicated, the investigation of crime by a grand jury implements a fundamental role of securing the safety of the person and property of the citizen, and it appears to us that calling reporters to give testimony . . . 'bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.'"

403 U.S. at 680-81, 700. The Court concluded, "On the record before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but

uncertain, burden on news gathering that is said to result. 408 U.S. at 690.

In the case at bar, the effect on speech, if any, is far less perceptible than in Branzburg, which may cause reporters to be unable to tap a variety of news sources because of potential disclosure. On the other hand, the function of providing fair elections is, if anything, even more fundamental a function of our government than law enforcement. Thus Branzburg v. Hayes indicates that Article 14.10(b) should be upheld.

There are many other cases that similarly indicate that the statute should be upheld. Thus in United States v. Harriss, 347 U.S. 612 (1954), this Court considered the constitutionality of the Federal Regulation of Lobbying Act, which required lobbyists to disclose to the Congress their names together with their employer's names, together with their pay and expenses. The lower court had held the Act unconstitutional under the First Amendment, but this Court reversed with the following words:

> "Present day legislative complexities are such that individual members of Congress cannot be expected to explore the pressures to which they are regularly subjected . . . .
>
> "Congress has not sought to prevent these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation . . . .
>
> "The hazard of [first amendment] restraints is too remote to require striking down a statute which on its face is otherwise too plainly within the area of congressional power and is designed to safeguard a vital national interest."

347 U.S. at 625-26. A lobbyist hired by an employer to influence Congressional votes as

in Harriss is in a position analogous to that of the advertiser hired by a candidate to influence votes of the electorate in the case at bar. All the Texas statute at issue here does is ask "a modicum of information" for the public, which is in more dire need of it even than Congress.

More recently, in California Bankers Ass'n v. Shultz, 42 U.S.L.W. 4481 (1974), this Court held that the Bank Secrecy Act was constitutional. The Court's opinion begins by recognizing the substantial disclosures required by the Act:

> "[T]here is no denying the impressive sweep of the authority conferred on the Secretary of the Treasury by the Bank Secrecy Act of 1970. While an Act conferring such broad authority over transactions such as these might well surprise or even shock those who lived in an earlier era, the latter did not live to see the time when bank accounts would join chocolates, cheese and watches as symbols of the Swiss economy."

42 U.S.L.W. at 4481. In the case at bar, this Court could recognize that persons from an earlier era did not live to see the time when dirty tricks became the symbol of certain aspects of elections.

The Bank Secrecy Act was challenged in California Bankers on many grounds. The Court declined to rule on some of the plaintiffs' first amendment arguments, but as to others the Court expressly held that the associational privacy and anonymous speech cases "do not elicit a per se rule that would forbid such disclosure where the governmental interest would override the associational interest in maintaining such confidentiality." 42 U.S.L.W. at 4492.

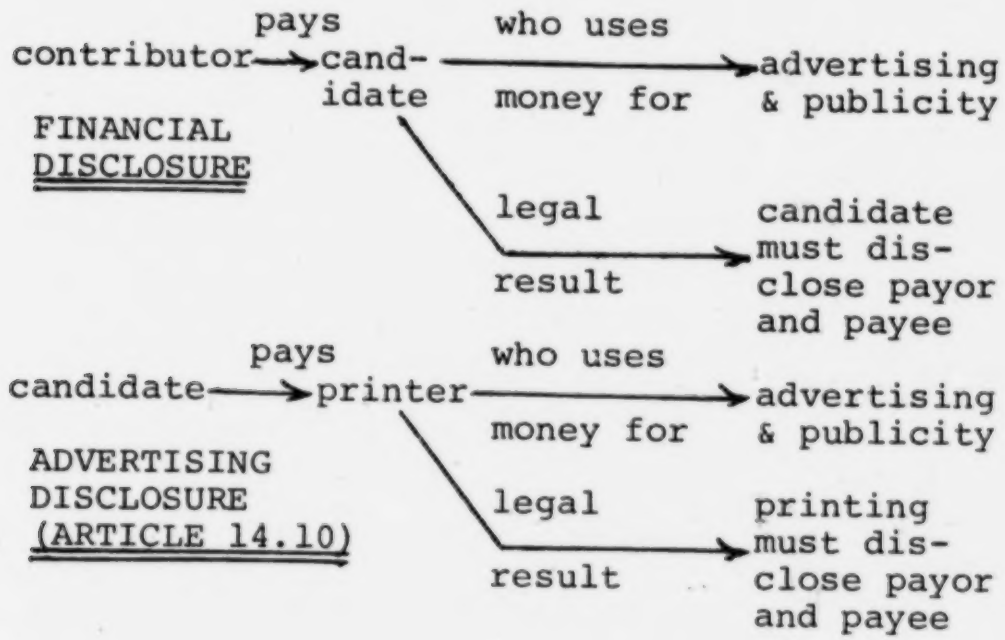
In addition to these cases, there is a mass of other decisions indicating that disclosure laws are proper legislative enactments to advance sufficiently strong governmental

interests. See, e.g., Lewis Pub. Co. v. Morgan, 229 U.S. 288 (1913)(requirement that newspapers contain statement of ownership, management and circulation is constitutional); Veterans & Reservists for Peace in Vietnam v. Comm'r, 459 F.2d 676 (3d Cir. 1972)(Trading with the Enemy Act, requiring licensing and consequent loss of associational privacy of persons importing materials protected by the First Amendment, is constitutional); S.E.C. v. Wall Street Transcr. Corp., 422 F.2d 1371 (2d Cir. 1970) (Investment Advisers Act, construed to require newspaper publishers to make disclosures for protection of public, is constitutional); Powe v. Miles, 407 F.2d 73 (4th Cir. 1968)(college campus rule requiring disclosure in advance of any "demonstration" is constitutional); Wirtz v. Fowler, 372 F.2d 315 (5th Cir. 1966)(Labor-Management Reporting and Disclosure Act, which requires that attorneys engaged in "persuader" activities disclose publicly their associations with employer clients to avoid labor spies, espionage and deceptive persuasion, is constitutional). The statute at issue here enacts an extremely narrow kind of disclosure to meet a governmental interest of the highest order, and under the cases it falls within the category of proper legislation.

D. Article 14.10(b)'s requirements are the exact parallel of disclosure requirements addressed to campaign contributions and expenditures and do no more than ascertain what financial pressures influence votes.

Article 14.10(b) is exactly parallel to laws requiring disclosure of campaign contributions and expenditures. All it does is require disclosure surrounding payments that go to printers for printing election advertising.

In diagrammatic form, the similarities between financial disclosure of contributions and Article 14.10(b) could be expressed thus:



In other words, Article 14.10(b) is similar to financial disclosure of contributions in that it traces payments of money influencing votes. Indeed, if the candidate complies with the campaign contribution disclosure law in Texas, the printer's name and address will ultimately become public record as part of the candidate's own separate expenditure disclosures.

It is submitted that a disclosure law having this effect is constitutional. In Burroughs v. United States, 290 U.S. 534 (1933) and United States v. Harriss, 347 U.S. 612 (1954), similar laws were upheld against constitutional attacks.

E. Article 14.10(b) protects First Amendment rights, including the rights of candidates and their supporters to campaign in a fair election and the right of voters to vote

in a fair election.

Beyond its efficacy in protecting fundamental governmental interests, Article 14.10(b) has an additional and independent justification in that it supports First Amendment rights of individuals in the elective process. Candidates have a right to campaign in a fair, democratic election, and their supporters have a right to be able to support them in such an election. These rights have a First Amendment basis. Bullock v. Carter, 405 U.S. 134 (1971); Hadnott v. Amos, 394 U.S. 358 (1969); Williams v. Rhodes, 393 U.S. 23 (1968).

Article 14.10(b) advances these rights because it provides a candidate in an election with the kind of information the Harriss case said Congress ought to have with reference to lobbyists. It provides a way that a candidate can publicly deal with the dirty trick of the falsely attributed smear. The statute is rendered all the more necessary by the fact that time in an election is limited. Without this Texas statute, the candidate could expend heavy resources to investigate a smear and perhaps would only be able to make some response after the election. Post-election investigation does not help the candidate to exercise First Amendment rights where they count, in the election itself. Article 14.10 is designed to function during the election.

The voting public also has First Amendment rights in an election campaign. Williams v. Rhodes, supra, Jeness v. Little, Brown v. Storer and American Party v. White, supra, all indicate by implication that the voter has a right to an election free of deceptive practices. significantly, this right of voters to a fair election was not an issue in Talley v. California, Appellees' case of principal reliance.

II. THIS STATUTE DOES NOT VIOLATE THE DECISIONS OF THIS COURT CITED BY APPELLEES.

A. There is no conflict between Article 14.10(b) and the principles of Talley v. California.

Appellees state in their complaint that they rely "particularly" on Talley v. California, 362 U.S. 60 (1960), which they assert is "directly on point". Complaint, Paragraph VI. It is respectfully submitted, however, that the principles announced in Talley, do not cover the kind of statute involved in the case at bar.

Talley was never intended to mean that all disclosure laws are unconstitutional. Indeed, Talley must be read in the context of the many decisions that have upheld disclosure laws against claims such as those of Appellees here. A few of these decisions, from Harriss to California Bankers, are cited above. But even beyond the many reported cases upholding disclosure, Talley must be read in the context of the countless instances in which disclosure requirements are so obviously necessary and proper that the question of their constitutionality never arises. An example close at hand is provided by the Rules of this Supreme Court.

Rule 39 of the Rules of this Court requires that each printed document filed with this Court bear the name of the filing attorney and his address, together with the name of the party he or she represents. These names become public record and are printed with the published opinions of the Court. The reason for Rule 39 is clear: the Court needs to know which party is given brief has come from in order to understand it, and the Court also needs to know the name and address of an attorney to whom it can

direct notices and inquiries (if only so that the Court may assure itself that impostors are not filing papers without a party's authorization).* Likewise, Article 14.10(b) simply seeks to discover the source of election advertising and to locate an address to which persons may go to ascertain with reasonable certainty who has promulgated it, in a situation in which the frequency of impostors' dirty tricks is alarmingly high. Article 14.10(b) does not offend the Talley principle any more than does Rule 39.

Furthermore, a reading of Talley itself shows that the decision is not intended to make every disclosure law unconstitutional. The statute at issue in Talley was not concerned with election campaigns or with the integrity of any governmental process. It was simply a dragnet statute that covered every kind of printed communications that anyone in any circumstances might want to distribute. This Court quoted the broad language of the California statute in Talley as covering "any handbill, in any place, under any circumstances." Understandably, the Court found that the governmental interest in this broad disclosure was so slim as to be nonexistent. The Court stated its holding thus: "There are times and circumstances when the States may not compel members of groups engaged in the dissemination of ideas to be publicly identified." 362 U.S. at 65 (emphasis added). Thus Talley stands for the proposition that there exists a right of nondisclosure in communications unless the government can show that it is requiring the disclosure in good faith to serve an important legitimate purpose.

*In addition to disclosure on all documents filed, this Court requires initial background disclosures from every attorney who applies to become a member of the Bar of this Court. For example, an applicant must disclose his employment and the name and address of every firm with which he has been associated. These requirements are also an example of disclosure necessary to maintain the integrity of a governmental process, and they do not conflict with Talley v. California.

Furthermore, there are other strong indications, besides the facts and holding of the case, that show that Talley was never intended to cover the case at bar. The dissent in Talley, for example, pointed out that the decision did not affect certain recognized disclosure requirements, including statutes "forbidding the distribution of anonymous publications with reference to political candidates." 362 U.S. at 70. The majority opinion in Talley indicates that Talley must be read in connection with such earlier cases as NAACP v. Alabama, 357 U.S. 449 (1958). In that case, the Court utilized a principle protecting anonymity because Alabama was acting in bad faith, with no valid interest, to harass the NAACP and its members. In short, Talley and NAACP v. Alabama do establish a principle of anonymity where the government's interest in requiring disclosure is improper or insufficient, but that does not mean that disclosure can never be required when, as here, the State can show good faith efforts to protect a fundamental interest. Compare, e.g., Baird v. State Bar, 401 U.S. 1 (1979) (State may not require disclosure of bar candidates' Communist party affiliations to harass suspected Communists) with LSCRRC v. Waldmond, 401 U.S. 154 (1971) (another state bar's good faith investigation of bar candidates through reasonable disclosure requirements held constitutionally permissible).

Although this Court has never ruled on the constitutionality of a statute like 14.10(b), a number of other courts have so ruled. The federal counterpart to Article 14.10, which is 18 U.S.C. §612, has been considered and upheld twice since the Talley decision. The reasoning of these two federal district courts was that the statute in Talley was a broad one, covering all handbills, while section 612 applies only to statements about candidates in elections. United States v. Insco, 42 U.S.L.W. 2284 (M.D.Fla. 1974); United States v. Scott, 195 F.Supp. 440 (D. N.D. 1961). A number of state courts have also held statutes similar to Article 14.10 (b) constitutional. See, e.g., Ex parte Hawtorne, 116 Fla. 608, 156 So. 619 (1934); State v. Freeman, 143 Kan. 315, 55 P.2d 362 (1934); State v. Babst, 104 Ohio St. 167, 135 N.E. 525 (1922); see also Commonwealth v. Acquaviva, 187 Pa. Super. 550, 145 A.2d 407 (1958); but see ex parte Harrison, 212 Mo. 88, 110 S.W. 109 (1905); New York v. Duryea, 42 U.S.L.W. 2420 (N.Y. S.Ct. 1974) (currently on appeal in New York courts).*

---

* Because of Appellees' reliance on Duryea in the district court Appellees would call this Court's attention to that decision also. The facts were a picturebook example of the worst kinds of campaign dirty tricks on a massive scale. See N.Y. Times Jan. 25, 1975, p.1 col.8. The Court, while holding that Talley rendered the New York disclosure statute unconstitutional, stated that "the compelling state interest that would underlie such a statute has never been more obvious." The court then went on to suggest that the legislature might meet this interest by passing laws (1) "preventing ethnic, racial or religious slurs;" (2) limiting "attacks on the purely personal character of a candidate;" and (3) deterring

Appellees cite the language of Talley which explains the need for anonymity of John Lilburne and Thomas Paine in view of government persecution of political writers. Article 14.10(b), however, does not apply to anything other than issues and candidacies which the government has already, by definition, placed on the ballot for the express purpose of having the public vote upon them. It should not be assumed that the government will use disclosures to persecute writers when the government has formally opened public debate on the subject by setting up an election. Thus while there is no question that the writers mentioned in the Talley opinion should remain anonymous, Article 14.10(b) does not affect their writing outside elections and does not contain the dangers that were inherent in the California statute at issue in Talley.

B. There is no conflict between the Texas statute at issue here and the principles of Miami Herald Pub. Co. v. Tornillo.

Appellees also have relied upon this Court's decision in Miami Herald Pub. Co. v. Tornillo, 94 S.Ct. 2831 (1974), in which this Court struck down the Florida equal space right-of-reply statute. Article 14.10 (b), however, is poles apart from the law at issue in Tornillo, which told newspaper

---

"falsehoods" in elections. It is submitted that the Duryea opinion points eloquently to the need for Article 14.10. The alternatives proposed by that Court to meet the "obvious" compelling state interest would all be extremely harmful to the cause of free speech in an election.

editors to print complete political messages in a form, size and location dictated by the government whenever a newspaper criticized a candidate in an election. Mr. Chief Justice Burger referred to the Florida statute as "an intrusion into the function of editors." Article 14.10(b), by contrast, requires only that the printer and purchaser put their names on election advertising, in much the samemanner and for much the same reasons as court rules require that attorneys' and parties' names appear on briefs submitted to a court. The identification thus made does nothing to interfere with the "function of editors," nor does it dictate in any way what the message is to be.

For these reasons, the case at bar seems controlled not by Tornillo but rather by such decisions as Lewis Pub. Co. v. Morgan, 229 U.S. 288 (1913), which upheld the federal law requiring public identification of ownership, management and circulation in newspapers. The Miami Herald Publishing Company, for instance, was (and still is) required to label every newspaper issue with such a statement, which is the exact counterpart of Article 14.10(b) here; but this identifying statement was not the newspaper's complaint at all in Tornillo, nor did the case have anything to do with the requirement. Such a statement of identification does not affect the content of the message itself, does not involve the government in any discretionary decisions regarding message content, and does not necessitate any "intrusion into the function of editors."

III. ARTICLE 14.10(b) DOES NOT STOP, CENSOR OR OTHERWISE CURTAIL THE LIBERTY OF THE PRESS AND DOES NOT ABRIDGE THE RIGHT OF ASSOCIATION.

A. Minority party candidates will not be adversely affected by Article 14.10(b). If they are able to get onto the ballot, and if they are able to pay for advertising printing, there are numerous printers available to print their campaign literature.

One of the arguments advanced by Appellees and amici curiae supporting them is that Article 14.10(b) will mean that minority parties will not be able to secure printers to print their campaign advertising. The argument is that printers will be so abhorrent of having their company identification printed on the literature of a political party that they will uniformly refuse to accept payment, and there will be no way in which the literature from such sources can be physically produced, all as a result of Article 14.10(b). In evaluating this argument, one should realize that it represents the worst-case speculation of attorneys; there has been no case presented of a candidate who is on the ballot, who has money to pay for printing, and who has been unable to secure printing as a result of Article 14.10(b)* It is submitted, furthermore, that it is unlikely there will ever be such a case in the future.

---

*For this reason, the argument of Appellees here set forth not only appears lacking in merit; it could also be argued that this particular claim does not present a justiciable question. There is no concrete injury or imminent threat of injury to any minority candidate on this record. Under the principles announced in California Bankers, supra, as well as O'Shea v. Littleton, 94 S.Ct. 669 (1974), it may well appear that the

This argument of Appellees underestimates the number of printers that are available and the nature of the printing industry. In Houston, Texas, alone, there are eight pages of printers listed in the Yellow Pages. There are more in Dallas, Austin, Fort Worth, San Antonio, Amarillo, and for that matter in the little towns of Texas such as Corsicana, Sealy, San Angelo and Cuero. These printers are not a monolith; they are of all social classes, all races, all religions, all political persuasions, all sizes of operation. All need business to survive economically. The industry is highly competitive on the level that is relevant to this inquiry, and are relatively low.

Furthermore, before coming to the printer a candidate must be able to afford to purchase advertising. Contributions received will have to be publicly disclosed under another section of the Texas Campaign Reporting

---

constitutional requirement of a case or controversy is lacking. Further, Appellees may lack standing to present those claims, which would seem to be more properly asserted by parties who would be the ones who would suffer theclaimed injury if it occurred. Nor is this an instance in which standing to assert jus tertii would appear appropriate, because there is no reason why a truly injured minority party or candidate could not sue for itself. Cf. In re Lifscutz, 2 Cal. 3d. 415 (1970) (rejecting claim of jus tertii-based standing in disclosure situation). Common Cause does, however, believe that final determination of Appellees' claims would benefit the electoral process if such a determination here does not impose upon this Court's jurisdictional requirements.

and Disclosure Act (as will the fact of the expenditure made to the printer). In addition, the candidate will have to have succeeded in getting on the ballot; in Texas, for a statewide office, Article 13.45 requires in excess of 30,000 signatures on nominating petitions for new parties. See American Party v. White, supra. The argument that a serious candidate or ballot proponent who meets these requirements will not be able to get printing under these conditions is unduly pessimistic.

Indeed, if the argument of the Appellee in this respect were correct, the result would be that the way would be paved for an enterprising new printer to enter the business. Such a printer could enter the business, under the name "Minority Party Printing Co.," and notify minority parties throughout the state who are, by assumption, unable to get any other printer to accept payment for printing. Such parties--from Raza Unida Party to the American Party to the Socialist Workers Party--generate significant printing requirements. The new printer would only have to comply with Article 14.10(b) by printing "Minority Party Printing Co.," together with the firm address and the name of the advertising purchaser. This "new" printer already exists--in the persons of the thousands of printers who are already printing, many of whom would like to receive payment for printing from minority parties.

The attribution required by Article 14.10(b) need not be of any particular size or in any particular location. It may, and as a matter of current practice frequently does, appear in an inconspicuous place, accompanied by an explanation that the attribution is "required by law" or "required by the Texas Campaign Reporting and Disclosure Act." Such a modest requirement will not render minority parties unable to find any printer

in the State of Texas unwilling to accept payment for advertising.

B. To the extent that the Appellees' claims are commercial in nature, those claims are not protected by the First Amendment.

Appellees' complaint seeks protection for Appellees' "Business associations and dealings . . . or loss of revenues . . . ." Complaint, paragraph 9e. At oral argument in the district court, Appellees fleshed out this claim by an example: one printer was engaged in printing advertising for proponents of liberalized gambling laws at the same time as the printer was printing anti-gambling literature related to an upcoming election for the Baptist Church, and this printer feared that he might lose revenues as a result of Article 14.10(b) since one or the other customer might go to another printer.

This interest of the printers in maintaining business from conflicting clients so as to increase revenues which might otherwise go to other printers is not an interest protected by the First Amendment. The First Amendment is concerned not with who does the commercial task of printing but rather with the matter of getting the message of the speaker into the marketplace. Pittsburgh Press Co. v. Human Relations Comm'n, 41 U.S.L.W. 5055 (1973), indicates that commercial interests as such do not fall within the protection of the freedom of speech. Furthermore, it has long been the rule that economic effects on the communications media are not violations of the First Amendment, and this principle holds true even if there is an incidental effect on speech. E.g., Lorain Journal Co. v. United States, 342 U.S. 143 (1952) (antitrust laws applied to a newspaper do not violate the First Amendment, even though they may change the nature of press coverage); Oklahoma Press Co. v. Walling, 327 U.S. 186 (1946) (application of the Fair Labor Standards Act to the newspaper business is not unconstitutional even though the Act clearly makes reportage more expensive, may bankrupt marginal operations and increases difficulty of covering heavy news days by limiting work hours). Of course, these cases do not indicate that the mere fact of payment takes speech out of the First Amendment, and Common Cause is not arguing that there are no other First Amendment issues here. It is submitted, however, that to the extent that Appellees argue that they should be able to prevent customers from going to other printers, Appellees are urging a commercial interest not protected by the First Amendment.

C. Even if a "least-onerous alternative" test is applied here, Article 14.10(b) passes constitutional muster. It is the least onerous practicable method that will achieve the fundamental purposes at stake.

There is always a temptation for a person reading a statute to think upon first glance that it would be easy to write something better. Thus Appellees, in their Motion to Affirm, suggest a number of different ways in which they would like the legislature to have written Article 14.10(b). It is respectfully submitted that none of these proposals would adequately meet the statutory goals, and several of Appellees' proposals would themselves be oppressive to the First Amendment freedoms.

(1) The suggestion of a "secret code" system.

Appellees suggest that a secret code number could be assigned by the state to each printer who applied for one. Appellees proposed that each printer be required to place that number on all advertising. Interested citizens could then call the government and find out the name and location of the printer from the code number so that they could go to that address to inspect the signed copy of the advertising required by 14.10(b).

One basic trouble with such a system is that it would require a printer to register with the State before printing anything. The Texas legislature cannot be faulted for believing that the decisions of this Court, such as Thomas v. Collins, 323 U.S. 60 (1945), rendered such a prior registration scheme unconstitutional. Beyond its unconstitutionality, such a scheme poses practical difficulties: it would require a campaign advertising printer operating out of his garage with a mimeograph machine to register with the government and get a number before printing.

Finally, a system that requires the citizen to initiate a request for secret information is illogical. The secret code proposal implies that the citizen has a right to get the information but imposes a barrier for no other reason than to make it more difficult for him or her to get it, even though analysis of this kind is essential to the purposes of the Texas Campaign Reporting and Disclosure Act.

(2) The suggestion of a central government respository in which printers would be required to file all election advertising.

Appellees have also suggested that Article 14.10(b) could be rewritten to require that a copy of each piece of campaign

literature be filed with a government repository, together with the printer's name. An interested citizen could then travel from his home to inspect the filed copy and discover the printer's name and address.

This proposal suffers many of the same legal and practical difficulties that are presented by the secret code proposal. First, the question arises: least onerous for whom? A central repository system would render it more expensive and difficult for candidates and citizens to learn the sources of campaign literature and trace it to verify it. Delays occasioned by retrieval also would leave insufficient time for analysis before an election. Furthermore, a central filing system, as proposed by Appellees, would not require any indication on the face of a campaign allegation that would allow a voter or reader to tell whether it is in compliance. This lack of capacity for voter recognition of compliance would defeat one of the significant benefits of Article 14.10(b). Finally, such a system would require the government to set up warehouses for the storage of every item of campaign advertising and to pay for themaintenance, classification, indexing, retrieval and replacement of each such item.

(3) The suggestion that the State could make "misleading" campaign advertising illegal rather than disclosing its source and letting the voter decide.

Appellees have also advanced the argument that Article 14.10 should be replaced by a criminal libel law or other statute designed to prevent false statements in elections. The answer to this suggestion is that a criminal law against "false" statements in elections would be a severe danger to the First Amendment. It would cause can-

didates to censor their speech out of caution lest their remarks be deemed "falsehoods," "misrepresentations," or "libel," and it would be subject to abuse in a way undreamt of for Article 14.10(b).

Texas repealed its criminal libel law effective January 1, 1974. The repeal was considered at the time to be progressive and enlightened. The prior law made it easy for an incumbent politician to use prosecutions to stifle opposition by causing charges to be brought in marginal cases.

There is another reason Texas should not be required to rely solely upon "anti-falsehood" laws in the election context, and that is that they would not be effective to stop dirty tricks or the other evils to which Article 14.10(b) is directed. First, an anti-falsehood law applied to candidates for public office could only be constitutional if limited to statements made with actual malice or reckless disregard of the truth. New York Times v. Sullivan, 376 U.S. 254 (1964), carried forward by Gertz v. Robert Welch, Inc., 42 U.S.L.W. 5123 (1974). Furthermore, the public would not be given any information during an election by an anti-falsehood law; all such a law would do would be allow prosecution of the perpetrator of the falsehood, after the fact, if he could be apprehended. Worst of all, many dirty tricks can be carried off without any affirmative misrepresentation and would be extremely difficult to cover by libel legislation. United States v. Insco, supra, is a case in point. Republican congressional candidate Insco flooded his district with bumper stickers reading "McGOVERN-GUNTHER," thus linking his Democratic opponent, Gunther, with the Democratic presidential candidate, who was unpopular in the district. There was nothing "false" about the stickers themselves; what was "dirty" about them was that readers

would naturally assume that Democrat Gunther, rather than Republican Insco, was behind them. Donald Segretti's advertisements were not affirmatively "false" either. A law against libel or falsehood would do nothing to stop such conduct.

(4) The suggestion that only the name of the purchaser of the advertising, and not that of the printer, be required to be disclosed.

It has also been suggested that the statute should be rewritten to require only disclosure of the "person paying" for the advertising, and that the printer be omitted. Actually, before 1973 the purchaser of the advertising was all that Texas law required disclosed. Article 14.10(b) was amended in 1973 to include a requirement for designation of the printer. The reason for the amendment was that without printer identification the statute was almost totally ineffective at stopping or detecting falsely attributed smears and other types of dirty-trick campaign literature.

Affidavits in the record of State investigators Randall Wood and John Roy Henderson document the failure of the prior law. Without printer designation, all that a smeared candidate could produce would be a piece of literature with a campaign charge about him. Lack of a requirement of printer

---

*Insco did, in fact, proceed to compound the tactic by publicly charging that Gunther was behind the stickers, but such a statement would not have been necessary to the functioning of the dirty trick. Insco was convicted not under a libel law but under 18 U.S.C. §612, the federal counterpart to Article 14.10(b). United States v. Insco, supra.

designation made it impossible even to determine or prove with any assurance whether the smear was falsely attributed. Unable to locate a printer through whom to trace the literature, investigators were like climbers unable to reach the first rung of a ladder; without the printer's name and address, it was not possible to utilize the requirement that a signed copy be retained by the printer for investigation.

AmendedArticle 14.10(b) provides a way whereby a candidate can, with reasonable assurance of accuracy, do one of two things: (1) trace the advertising to its source, or (2) demonstrate that it does not comply with the law and is therefore deserving of a lesser degree of belief. These things can be done quickly enough to allow an answer during the election. Without printer designation and retention of the signed copy for inspection, these steps would not be possible.

The suggestion that the printer be omitted, therefore, amounts to a suggestion that the State of Texas could have passed a law that would be less efficacious in protecting the governmental interests involved. In Branzburg v. Haynes, supra, this Court was faced with a similar argument, to the effect that a grand jury ought to be disallowed from calling newspersons to testify if the grand jury could get by without their testimony. This Court held that there was no requirement that the grand jury curtail its requests for information and thereby have a less effective investigation. 408 U.S. at 701. Similarly, Texas should not be required to sacrifice its disclosure requirements and have a statute here that would be ineffective to combat dirty tricks.

* * * * *

It is important in considering these counterproposals of Appellees to recognize

that Article 14.10(b) does not stop, censor or curtail any speech or relationship of association. The cases widely recognize the right of the States to enact reasonable regulations of the "time, place and manner" of speech in appropriate cases, and indeed in the election context the United States Constitution expressly provides that the States have such authority. Article 14.10(b) has no more effect than any other reasonable regulation fitting within the time, place and manner category. Texas should not be required to adopt ineffective or oppressive laws when the aim is fair election. Comparison with Appellees' counterproposals shows that the Texas legislature has actually exercised good judgment in choosing among the alternatives.

IV. ARTICLE 14.10(b) IS MORE THAN APPROPRIATELY SPECIFIC WHEN CONSIDERED IN LIGHT OF THE CONTROLLING CASES, AND APPELLEES' "VAGUENESS" ARGUMENT IS LACKING IN MERIT.

Appellees cite Connally v. Gen. Constr. Co., 269 U.S. 385 (1925), in their Complaint as indicating that Article 14.10(b) is unconstitutionally vague. Complaint, paragraph 8(a). Connally holds that a statute is void for vagueness if persons of ordinary intelligence would have to "guess" at its meaning. It is submitted that Article 14.10(b) more than meets this requirement.

In United States Civil Serv. Comm'n v. Letter Carriers, 41 U.S.L.W. 5122 (1973), this Court upheld the Hatch Act against a similar vagueness attack. The words of Article 14.10(b)--"printer or publisher" and "person paying for the advertising"--are far more specific than the Hatch Act's use of such terms as "active part" in campaigns

or political "management." In Letter Carriers, this Court recognized that there are limitations on the specificity of language and therefore with any statute a skeptic can postulate marginal situations that can be called vague. But Letter Carriers indicates that the legislature is entitled to assume that persons subject to the statute will exercise "common sense" in their effort to comply with the law.

In this case, the Appellees' vagueness claims are not directed at the traditional vagueness concept of a statute without standards, and Article 14.10(b) cannot be asserted to have the profound defects that a universal vagrancy or disturbing-the-peace law might exhibit. Those statutes, unlike Article 14.10 (b) give police officers license to arrest anyone. Rather, the argument against 14.10(b) is thatAppellees read it so as to allow more than one way to comply. It is submitted that thismultiplicity read into the statute is not the product of reasonable construction, but even if there were more than one reasonable way to comply with the statute, that fact would not render the statute impermissibly vague. Compliance in any reasonable way would have to be deemed sufficient, and the government could not successfully prosecute unless it could negate the claim of compliance in each ofthe reasonable ways in which the statute could be read. This is the square holding of United States v. Vuitch, 402 U.S. 62 (1971). Thus under Vuitch, Appellees' argument that Article 14.10(b) allows them to identify "advertising agencies, individual advertising agents, political committees, their chairmen or some other individuals or agencies" as the "person paying," even if meritorious, would not render the statute void for vagueness, but would simply allow compliance by the placing of any one of the names that could reasonably be read as com-

plying.

Article 14.10(b) should be compared with 18 U.S.C. §612, its federal counterpart. Section 612, which has been in effect since the early 1950's, requires identification of theperson "responsible" for election advertising. This statute, although arguably less specific than Article 14.10(b), has functioned smoothly since enactment. There is no reported case asserting its vagueness. Federal candidates and their printers have had no difficulties complying with it. A candidate or printer using common sense and trying to comply would not have difficulty with 14.10(b) either.

Furthermore, Appellees are protected not only by the Vuitch construction principle but also by the construction placed on the statute by the Attorney General in this case. Vernon's Tex. Pen. Code Ann. Art. 8.03 provides an absolute defense to prosecutionfor any one who reasonably relies upon a written interpretation of the law by a responsible state officer. The Attorney General, acting for himself and the Secretary of State, has here written a brief explaining Article 14.10(b) in response to Appellees' claims of vagueness. Anyone following this interpretation would ipso facto be in compliance with the law.

CONCLUSION

Article 14.10(b) performs crucial functions in assuring fair elections and is unquestionably related in a reasonably way to the advancement of a compelling state interest. It is not vague or overbroad. It does not stop, censor, or abridge the right of speech or association; it is simply a reasonable, limited "time, place and manner" law. All it does is ask a "modicum of information" about the financing of com-

munications that determine who will govern in this democracy. It is respectfully urged that the judgment of the district court declaring Article 14.10(b) unconstitutional and enjoining its enforcement should be reversed.

Respectfully submitted,

DAVID CRUMP
2018 Timber Lane
Houston, Texas 77027

FRANK G. WALTERMIRE
2480 Two Shell Plaza
Houston, Texas 77002

Attorneys for Common Cause

CERTIFICATE OF SERVICE

I, David Crump, as counsel for Amicus Curiae Common Cause, hereby certify that true and correct copies of the foregoing Motion and Brief have been served on opposing counsel named below by placement in the United States mail, postage prepaid, on this the _____ day of _____, 1975.

Ms. Elizabeth Levatino
Asst. Atty General
Capitol Station
Austin, Texas 78711

Ms. Mary Joe Carroll
P. O. Box 1148
Austin, Texas 78767

Mr. Joe Moss
Asst. District Atty
301 San Jacinto
Houston, Texas 77002

Mr. Leon Hirsch
711 Fannin, Suite 777
Houston, Texas 77002

Mr. Gerald Birnberg
5959 West Loop South
Bellaire, Texas 77401

DAVID CRUMP